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# 1903.

THE

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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

## Probate Division.

## COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

## COURT OF APPEAL;

ALSO DECISIONS IN THE

## ECCLESIASTICAL COURTS.


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1903.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.
PUBLISHING OFFICE, 7, FLEET STREET, E.C.



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# JUDGES

OF

## THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

## THE HIGH COURT OF JUSTICE.

1903.

---

The Right Hon. Sir Francis Henry Jeune, Knt., President.

The Hon. Sir John Gorell Barnes, Knt.

# JUDGES

OF

# THE COURT OF APPEAL.

1903.

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Earl of HALSBURY, Lord Chancellor.

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Sir RICHARD HENN COLLINS, Master of the Rolls.

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In the First Series,
[1903] 1 Ch. [1903] 2 Ch.

In the Second Series,
[1903] 1 K. B. [1903] 2 K. B. [1903] P.

In the Third Series,
[1903] A. C.

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DETERMINED BY THE

## PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

## HIGH COURT OF JUSTICE

AND BY THE

## COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

## ECCLESIASTICAL COURTS.

1902—1903.

---

### THE HARMONIDES.

1902
*Nov.* 3, 7.

*Admiralty—Collision—Assessment of Damage—Value of Ship lost.*

In estimating the value of a vessel at the time of a collision, whereby she was lost, the test, in the absence of a market value, is what the vessel was fairly worth to her owners from a business point of view.

As to the evidence to be regarded as of weight in estimating this value, the case of *The Ironmaster*, (1859) Sw. 441, followed.

MOTION, in an action for limitation of liability, by the owners of the steamship *Waesland*, some of the defendants, in objection to the report of the Liverpool District Registrar assessing the value of that vessel at the time of her loss at 18,000*l*.

The facts were shortly as follows :—

On the night of March 5, 1902, in consequence of a collision which occurred during a fog in the St. George's Channel between the steamships *Harmonides* and *Waesland*, the latter vessel sustained so much damage that she shortly afterwards

1902

THE HARMONIDES.

sank with all her cargo and the effects of the passengers and crew.

In an action of damage by collision brought by the owners of part of the cargo laden on board the *Waesland*, and others, against the owners of the *Harmonides*, the Court on April 10 pronounced the *Harmonides* alone to blame, and on May 12 the owners of the *Harmonides* obtained a decree limiting their liability at 8*l.* per ton on 3391 tons to 27,128*l.*, with interest at 4 per cent. from the date of the collision until payment into court.

The claims brought in for assessment amounted to 80,477*l.* 13*s.* 5*d.*, including the sum of 31,640*l.* claimed as the value of the *Waesland* and her stores.

At the reference before the Liverpool District Registrar, assisted by merchants, some of the cargo claimants objected to the sum at which the *Waesland* was valued. From the affidavits of two experts acquainted with the vessel, and filed in support of the claim, it appeared that the *Waesland* was an iron screw steamship of 4762 tons gross, and 3736 tons net, register, classed at Lloyd's 100 A 1. Her length was 435 feet, breadth 41 feet, depth 29 feet, and at the time of her loss she was bound from Liverpool to Philadelphia, viâ Queenstown, with cargo, 114 passengers, and a crew of 89 hands. She was alleged to be a leading and favourite vessel fully up to modern requirements in the trade in which she was engaged, fairly speedy, moderate in her consumption of coal, making her passages with regularity, holding American and Belgian passenger certificates, and, if she had been of British nationality, entitled to a passenger certificate under the provisions of the Merchant Shipping Act, 1894. It was further alleged that, if sold, she would have realized 31,000*l.* The vessel was originally called the *Russia* of 2920 tons, and was built in 1867 at Glasgow by J. & G. Thomson for the Cunard Line. In 1879 she was purchased for 18,000*l.* by the Société Anonyme de Navigation Belge-Americaine of Antwerp (the Red Star Line), who were her owners at the time of her loss. The following year (1880) she was lengthened by Harland & Wolff of Belfast and re-engined by John & James

1902

THE HARMONIDES.

Thomson of Glasgow at a total cost of 50,531*l.* In 1889 she was fitted with triple-expansion engines of 582 nominal horse-power by the same firm at a cost of 23,295*l.*, making the total amount expended upon the purchase and alterations 91,826*l.* This sum was reduced to 29,777*l.* by deducting 6 per cent. per annum for depreciation; to which sum was added 1508*l.* 7*s.* 2*d.* for stores on board, less 80*l.* for boats salved, bringing the net value of the vessel, her stores and outfit, up to 31,205*l.* 7*s.* 2*d.*

At the time of her loss the *Waesland* was insured for 30,000*l.*, upon a value of 40,000*l.*, and adding the proportion of the net premium from the date of the collision to the expiry of the insurance, 435*l.* 2*s.* 11*d.* together with 310*l.* 9*s.* 5*d.*, as the net freight at risk and lost by the collision, the total claim amounted to 31,950*l.* 19*s.* 6*d.*

On behalf of the cargo claimants an affidavit of Joseph Lachlan, licensed appraiser, and official Admiralty valuer, was filed, stating that, after examining the particulars of the *Waesland* as detailed in Lloyd's book, he fixed her market value at the time of her loss, exclusive of equipment for passengers, at 16,500*l.*

By his report, dated August 6, 1902, the registrar assessed the total claims at 67,734*l.* 9*s.* 11*d.*, the value of the *Waesland* being fixed at 18,000*l.*, with in addition 310*l.* 9*s.* 5*d.*, the amount of net freight lost, and 1508*l.* 7*s.* 2*d.* for stores, &c., less 80*l.* for boats salved, or a total of 19,738*l.* 16*s.* 7*d.*

The owners of the *Waesland* appealed as to so much of the report as dealt with their claim, and on November 3, by consent, the appeal to increase the sum of 18,000*l.* to 29,777*l.* came on to be heard by way of motion. An application was then made, and supported by affidavit, to add to the 29,777*l.* the sum of 1426*l.*, the value of the refrigerating machinery which had been omitted from the calculation. On the suggestion of the Court that the evidence as to value was insufficient, the case was adjourned for the attendance of witnesses.

Nov. 7. Four witnesses were examined on behalf of the appellants, two having made affidavits the substance of which

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is set out above. In further support of the view that the sum of 18,000*l.* was inadequate, they gave evidence that her profit-earning capacity made the *Waesland* a profitable vessel to her owners, and that there was practically no market value for Atlantic liners, as, when they ceased to be worked at a profit, they were sold at a breaking-up price. On behalf of the respondents, another valuer supported the finding of the district registrar by evidence as to the market value of the vessel, treating her as an obsolete boat which would fetch little more than scrap-iron price.

*Pickford, K.C.*, and *Lewis Noad*, in support of the motion on behalf of the appellants, the owners of the *Waesland*.

*Aspinall, K.C.*, and *Stubbs*, for the respondents, owners of part cargo laden on board the *Waesland*.

GORELL BARNES J. The owners of the *Waesland* in the limitation suit claimed to have their vessel valued at the sum of 31,640*l.*, that sum including stores on the voyage outward, and it was objected on the reference, by the cargo-owners of the *Waesland*, or some of them, that the value placed on the *Waesland* was too high, because if they could reduce that value their dividends would be larger. Thereupon a contest arose as to what was the true value to be placed on the *Waesland* for the purpose of her owners claiming a share of the fund in court.

The evidence before the district registrar at Liverpool consisted in the first place of an affidavit by Mr. E. Taylor, senior member of Richardson, Spence & Co., managing agents in Europe of the International Navigation Company of New Jersey, who purchased the vessel in 1879 from the Cunard Company for the Red Star Line, the owners of the *Waesland* at the time of her loss. There was also an affidavit afterwards filed by Mr. Boumphrey, who was for fifteen years general manager of the Cunard Company, who originally sold the *Waesland* to the Red Star Line. As I understand, that was the only evidence before the district registrar in support of the claim. As against that there was filed, as I understand, in consequence of some suggestion from the district registrar, the

affidavit of Mr. Joseph Lachlan, the well-known valuer, in which he gives his view of the market value at the time of the loss of this vessel. Exclusive of the equipment for passengers, he places that value at 16,500*l.* That was all the evidence given on behalf of the cargo-owners; and after consideration the district registrar, assisted by merchants, allowed 18,000*l.* as the value of the *Waesland*; that is to say, he increased the 16,500*l.* by some allowance for passenger equipment.

The owners of the *Waesland* move the Court, by way of appeal from that particular item, to vary the report. According to their notice of motion, they ask that the 18,000*l.* should be increased to the sum of 29,777*l.*, which is the figure originally put in Mr. Taylor's affidavit, leaving out the stores, which the registrar has dealt with separately. On the hearing before me it has been pointed out that Mr. Taylor's affidavit left out of consideration the fact that the vessel had been fitted with refrigerating machinery, and a further affidavit has been filed shewing that the extra cost of those items is 1426*l.* So I was asked on this motion to vary the report so far as it dealt with this figure of 18,000*l.* and to increase it to 31,203*l.*, made up of those two items, 29,777*l.* and 1426*l.*

The litigation in this Court has, I think, been brought about by the case being treated too scantily before the district registrar, because the moment the case was presented to me on these affidavits it became obvious that it would be desirable to see the witnesses and hear them cross-examined, and have them point out by what reasons they were able to support their affidavits. I think it is to be regretted that the matter was not more fully dealt with before the district registrar. It has been fully considered before me and I have seen the witnesses, and I think I am in a much better position for dealing with this case than the registrar was when he had it before him.

There is no real dispute between the parties as to the principle upon which the matter should be dealt with. I fully agree with the observations quoted from the case of *The Ironmaster*. (1) There is no doubt that in this class of case the

(1) Sw. 441.

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best evidence is that of those who know the ship, and the next best evidence that of those who have experience of the market, but who do not know the vessel except from the shipping records. There are other criteria, such as the amount of capital invested, the amount of depreciation, the amount of profits, and so forth. All these matters have to be considered, to my mind, where it is impossible to say that there is a real market test of the value of such a vessel as this. If one goes to the root of the matter, it is obvious that what the shipowners lose if a vessel like this is run into and sunk is what it would cost to replace them in the position they were in before the accident. But where a ship like this has gone to the bottom you cannot, speaking from a business point of view, replace them in the position they were in before, because you cannot replace the vessel which is at the bottom of the sea; you cannot buy another like her in the market; you cannot get another made immediately, and if you bought another ship she would be new, and consequently more valuable, because she would start as a new ship from that day, and, therefore, you would have to discount her value down. So that the real test, where there is no market, is, as counsel on both sides agree, what is the value to the owners, as a going concern, at the time the vessel was sunk? You cannot get at this with any great certainty, for you cannot get at it from the market value. Possibly, for such a ship at such a time there would be no buyers and she would have to be sold for old iron. You cannot deal with it like an ordinary commodity being sold every day. You must look at it and see what is the loss to the owners. It has been pointed out that you may look at the original cost, plus the money expended on her, and so forth. That is of assistance, but it is not complete assistance, because it is a rough and ready method. You may look and see also how the ship is paying. That, however, is not a complete test, because you cannot be sure that the way she has been paying will continue. But one thing is absolutely certain—you cannot say the test is her market value.

I think the registrar has come to an erroneous view about this case because he has not had it sufficiently threshed out

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before him. I have considered it with great care, and by the light of the class of ship, and of the considerations which ought to be taken into account in arriving at what the ship was really worth to her owners, and my opinion is that the appellants have not overstated their case. I think the vessel was worth 31,000*l.*, and I therefore propose to vary the report by increasing the sum of 18,000*l.* to 31,000*l.* The appellants must have the costs of the appeal.

Solicitors for appellants, the owners of the *Waesland*: *Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

Solicitors for respondents, the owners of part cargo on board the *Waesland*: *Stokes & Stokes, for Batesons, Warr, & Wimshurst, Liverpool.*

T. L. M.

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## ATTWOOD (OTHERWISE POMEROY) *v.* ATTWOOD.

1902

*Aug.* 11, 12.

*Nullity Suit—Decree—Variation of Settlements.*

Without deciding whether an ante-nuptial settlement came to an end upon a decree absolute for nullity of the marriage being pronounced, the Court, being of opinion that all points affecting the settlement should be dealt with finally and forthwith, ordered that the interest of the respondent (husband) in the fund settled on behalf of the petitioner (wife) should be extinguished, and that the fund settled by the respondent should, subject to payment thereout by the trustees of their costs and the costs of the petitioner, be handed over to the respondent.

THIS was a motion upon a petition to vary settlements, and it raised questions as to the position in suits for nullity with regard to ante-nuptial settlements.

On February 6, 1902, the petitioner (wife) obtained a decree nisi for nullity of her marriage with the respondent on the ground of his incapacity to consummate the said marriage.

The decree was made absolute on August 11, 1902, just before the motion came on for hearing.

It appeared from the report of the registrar that by an ante-nuptial settlement, dated October 4, 1892, the petitioner's father settled some 7000*l.*, and the respondent brought into

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settlement a similar amount. There was no evidence that either the petitioner or respondent had any other property.

By the terms of the settlement the petitioner's trust fund was to be held in trust for her father until the intended marriage, and upon and after the marriage for the petitioner's separate use without power of anticipation; subject thereto, for the respondent during his life, and then, in default of children of the said intended marriage, for the children of the petitioner by any subsequent marriage; with an ultimate trust, in default of children of the petitioner, for the second son of the petitioner's father.

The respondent's trust fund was, by the terms of the settlement, held in trust for the respondent until the intended marriage, and thereafter in trust for the respondent for his life; subject thereto for the petitioner for her life for her separate use without power of anticipation; and, in default of any child of the intended marriage, for the respondent absolutely.

In her petition the petitioner asked that the husband's interest in her fund should be extinguished, and that the trustees of the settlement should be directed to hold that fund upon the trusts declared by the settlement, but as if the respondent were dead in the petitioner's lifetime. The father of the petitioner assented to this, or to such other order as the Court should think right to make.

The respondent, while not objecting to the petitioner's fund being dealt with in the manner suggested, prayed in his answer that the settlement should be declared null and void, and that the trustees should be ordered to transfer to him, freed from the trusts of the settlement, the securities representing the fund brought into settlement by him, which he stated was previously his own absolute property; and, alternatively, he prayed that the petitioner's interest in this fund should be extinguished.

The petitioner resisted the respondent's prayer, and contended that while the respondent's interest in her fund should be extinguished, she should not be deprived of any of her rights or interests under the settlement in the respondent's fund.

The registrar reported that in his opinion this demand of

the petitioner was unreasonable, and that the justice of the case required that, if the respondent's interest in the petitioner's fund were extinguished, the interest of the petitioner in the respondent's fund should likewise be extinguished, and that, as there were no further trusts applicable to the respondent's fund, the securities representing the same should be retransferred to the respondent absolutely.

The petitioner gave notice of motion to vary the report, or, alternatively, to refer it back to the registrar for further investigation.

*Randolph*, for the petitioner.
*Bayford*, for the respondent.
*Dill*, for the trustees of the settlement.

*Cur. adv. vult.*

GORELL BARNES J. This case is one in which the question arises as to what order should be made under s. 5 of the Matrimonial Causes Act, 1859, together with the 3rd section of the Matrimonial Causes Act, 1878, with regard to the variation of the settlement which was made on the marriage between the petitioner and the respondent. On February 6 a decree nisi for nullity was pronounced on the ground of the respondent's incapacity, and that decree was made absolute yesterday.

The ante-nuptial settlement in question is dated October 4, 1892, and by it the petitioner's father settled a sum of 7000*l.*, and the respondent brought into settlement a similar sum upon trusts mentioned in the report of the registrar. The petitioner asks that the interests of the respondent in her trust fund should be extinguished, and that the trustees should hold this trust fund upon the trusts of the settlement as if the respondent had died in her lifetime; and the petitioner's father assents to this, or to such other order as the Court thinks right to make. The respondent also makes no objection to this. There is, therefore, no contest as to that part of the registrar's report which recommends that the petitioner's suggestion as to that part of the fund should be carried out.

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The point which, however, arises and which requires consideration is as to the respondent's settled fund. The respondent, as to this fund, asks that inasmuch as the marriage has been declared null and void, and there being of course under the circumstances no issue, that the trust fund which he brought into settlement, and which would have reverted to him if the marriage had continued and there had been no children, should be freed from the trusts of the settlement. The petitioner, on the other hand, objects to such an order being made, and the objection, as put forward by her counsel, is that she may have by law, as matters stand, a right to a life interest in the respondent's fund, and that she wishes to be allowed to retain that right, and therefore desires that no order should be made in respect of this fund. The registrar reports that the demand of the petitioner in this respect is unreasonable, and that this fund ought to be retransferred to the respondent absolutely. The substance of the point appears to be this: The petitioner contends that it is possible that the settlement, although the marriage has been declared null and void, may not terminate by that annulment of the marriage, and that if it does not there would be, after the respondent's death, a life interest in the petitioner's favour in respect of the respondent's fund. I do not understand the petitioner's counsel to contend that this would be so in view of the decision in *Dormer* v. *Ward*. (1) If the settlement does come to an end on the annulment of the marriage, the respondent would, as a matter of course, take an absolute interest in the fund brought into settlement by him, and no order of the Court would be necessary to give effect to this. But it is said on behalf of the petitioner, Do not deprive me of the opportunity of arguing that point, it may be many years hence, in case it is not correct, as a legal proposition, to say that the settlement has come to an end.

In my opinion, that is an unreasonable position for the petitioner to take up. It would, if acceded to, leave in doubt the position of the parties, it may be many years hence;

(1) [1901] P. 20.

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and I do not think that the matter ought to be allowed to rest in that uncertain position. The settlement ought, in my opinion, to be dealt with once for all, and an end should be made of the matter raised thereon between the parties.

I ask myself, therefore, whether the petitioner should have an interest reserved to her in the respondent's fund; but counsel for the petitioner did not adduce any facts to shew that I ought to make any specific order in favour of the petitioner out of the respondent's trust fund.

It is not, I think, necessary for me to decide whether or not the settlement has come to an end on the pronouncing of the decree absolute annulling the marriage; but I do not think it right that the question as to the respondent's fund should be left open, in the absence of any reason being put forward why a provision should be made for the petitioner out of the respondent's fund.

The respondent has assented to the suggestion that the Court should treat him as dead in dealing with the petitioner's fund, and I think that, with regard to the husband's fund, the order should be that it be retransferred to him.

The judgment, therefore, is that the recommendations of the registrar are right, and should be carried into effect.

The only other point to notice is that, in respect to the petitioner's fund, it would, if the settlement came to an end, revert to the petitioner's father, who settled it on her behalf, to be resettled with his sanction, if so desired. I suppose, under these circumstances, that the petitioner's father should be a party to any deed which may be necessary to carry out this order, and, if necessary, it must be referred to one of the conveyancing counsel of the Court to settle the proper deed.

*Dill*, for the trustees of the settlement, asked for costs.

GORELL BARNES J. Their costs ought to be paid out of the respondent's fund. The trustees will also have to provide for the costs of the petitioner in the same way. Subject to the

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payment of those costs, the trustees will hand over the respondent's fund to him. (1)

Solicitors for petitioner: *Pritchard, Englefield & Co.*
Solicitors for respondent: *May, Sykes & Co.*
Solicitors for trustees: *Collisson, Prichard & Barnes.*

H. D. G.

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1902
*Nov.* 24.

## IN THE GOODS OF JOSEPH BAXTER.

*Will—Nomination Paper—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 25, *sub-ss.* 1, 2.

A nomination paper, executed by the nominator under s. 25 of the Industrial and Provident Societies Act, 1893 (2), in the presence of two witnesses, who signed it in his presence, invalid as a nomination by reason of the amount it purported to dispose of being in fact over 100*l.*:—

*Held*, to be testamentary and admitted as a will.

MOTION to revoke letters of administration granted to next of kin as upon intestacy, and to admit to proof, as a valid will, a nomination paper invalid under the Industrial and Provident Societies Act, 1893. (2)

(1) The order, as drawn up, was in these terms: "The wife's fund, with her father's consent, to be resettled on her, on the same terms as those contained in the settlement, save that the husband be considered dead. The husband's fund to be released from the settlement and reconveyed to him. The trustees to pay their own and the wife's costs out of the husband's fund, and pay the balance over to him."

(2) 56 & 57 Vict. c. 39, is as follows. Sect. 25, sub-s. 1: "A member of a registered society, not being under the age of sixteen years, may, by a writing under his hand, delivered at or sent to the registered office of the society during the lifetime of such member, or made in any book kept thereat, nominate any person or persons other than an officer or servant of the society (unless such officer or servant is the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator) to or among whom his property in the society, whether in shares, loans, or deposits, or so much thereof as is specified in such nomination, if the nomination does not comprise the whole, shall be transferred at his decease, provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling."

Sub-s. 2: "A nomination so made may be revoked or varied by any similar document under the hand of the nominator, delivered, sent, or made as aforesaid, but shall not be revocable or variable by the will of the nominator or any codicil thereto."

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The deceased, Joseph Baxter, died on September 21, 1901.

On January 6, 1899, being at that time possessed of shares, in value over 100*l.*, in the Runcorn Co-operative Industrial and Provident Society, Limited, the deceased signed a nomination paper in the form prescribed by the society, whereby he purported to give the whole amount standing at his credit at the time of his death to his nephew, John Baxter.

The document was as follows:—

"I, Joseph Baxter

"(Residence) Alvanley, near Frodsham

"(Occupation) Labourer

a member of the Runcorn Co-operative Society, Limited, and Number 3252 in the said Society, do hereby nominate the following as the only person or persons (none of them being an Officer or Servant of the Society unless such person is the Husband, Wife, Father, Mother, Child, Brother, Sister, Nephew or Niece of Me the Nominator) to or among whom shall be transferred my property in the Society whether in Shares, Loans or deposits at my decease in such proportion as is set forth below opposite their respective Names.

| Name. | Description or Occupation. | Address. | Proportion. |
|---|---|---|---|
| John Baxter . | Nephew. | Alvanley. | All. |

"If the above-mentioned John Baxter does not survive the above Joseph Baxter, then the whole of the shares of the said Joseph Baxter to be paid to his nephew Robert Baxter of Alvanley.

"As witnessed my hand this 6th day of January, 1899.

"(Signature of Nominator) Joseph Baxter.

"(Signature of Witnesses) Thomas Clare, J. J. Shaw."

The amount at the deceased's credit in the society at the time of his death was 120*l.*, and interest 1*l.* 10*s.* 5*d.*

After the death, John Baxter applied to the society for

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payment, but was refused, on the ground that the nomination was invalid, owing to the fact that the amount at the deceased's credit exceeded 100*l.* (1)

On December 1, 1901, Elizabeth Littler, the lawful sister and next of kin of the deceased, obtained from the District Probate Registry at Chester a grant of letters of administration, she having sworn that Joseph Baxter died intestate.

On February 2, 1902, the society paid over to her the sum of 121*l.* 10*s.* 5*d.*

John Baxter now moved the Court to revoke the said letters of administration and to pronounce for the nomination paper of January 6, 1899, as a will duly executed by the deceased in accordance with the provisions of the Wills Act (1 Vict. c. 26).

*Barnard*, for the applicant.

*R. H. Pritchard*, for the administratrix. This application is an after-thought on the part of John Baxter. The document is not a will. One of the essential elements of a will is that it shall be revocable; nominations under the Industrial Societies Act, 1893, are not revocable: s. 25, sub-s. 2.

*Barnard*, in reply. Whether the document was good or bad as a nomination under the statute of 1893 does not matter. A will speaks from the death. With regard to the testamentary act done by the deceased, *Bartholomew and Another* v. *Henley* (2) is an authority, and is binding on the Court.

GORELL BARNES J. In my judgment, this document is testamentary. It fails, under the provisions of the Industrial Societies Act, 1893, to operate as a nomination paper. Under that Act, a member of the society may, by writing under his hand, nominate a person or persons to whom his interest in the society is to go after his death, provided the amount credited to him in the books of the society does not then—that is, at the time he executes the nomination—exceed 100*l.* sterling. I am told that it did exceed that sum, and that an

(1) Ante, p. 12, n. (2). (2) (1820) 3 Phil. 317, at pp. 318, 319.

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affidavit will be filed by the secretary of the society to that effect. If the document had been operative as a nomination, sub-s. 2 of s. 25 of the Act of 1893 would have taken effect, and the document would only have been revocable in the manner therein indicated, and it would not have been revocable by any will or codicil. But, as the document is not operative as a nomination, the sub-section has no effect in this case; and, that being so, I do not see why I should not accept it as a will. The two witnesses who signed it have made affidavits shewing that the terms of the Wills Act were in effect complied with. I therefore revoke the letters of administration granted to the sister of the deceased. I admit the document of January 6, 1899, as a valid will, and I grant administration, with the will annexed, to the applicant as the sole beneficiary thereunder. The costs of both parties should come out of the estate.

Solicitors for applicant: *Grundy, Kershaw, Samson & Co., for Linaker & Linaker, Runcorn.*

Solicitors for administratrix: *F. Venn & Co., for C. E. Nield, Liverpool.*

H. D. G.

1902
*Nov.* 25.

## WADE *v.* WADE (BROOKE INTERVENING).

*Divorce—Practice—Intervener—Successful Defence—Costs.*

Upon a wife's petition for dissolution of marriage, the husband filed an answer denying all the charges made against him in the petition, but, when the case was in the paper for hearing, upon an application being made on behalf of the petitioner for a short adjournment, counsel for the husband stated that he was not in a position to defend the suit so far as the charges of desertion and adultery were concerned.

An application was thereupon made on behalf of a person named in the petition that she might have leave to intervene and defend herself in respect of the particular charge of adultery with which her name was associated, and the Court gave leave accordingly.

Upon the case coming on for hearing, the charge of adultery was disproved, but the wife was granted a judicial separation on the ground of the respondent's desertion.

Upon the question arising as to costs :—

*Held*, that, under the circumstances, the Court ought to place the intervener in the best possible position to obtain the costs of her successful intervention, and that an order should be made in her favour against both the petitioner and the respondent.

WIFE'S petition for dissolution of marriage on the grounds of desertion, cruelty, and adultery with a person named and with a woman or women unknown.

The husband filed an answer denying all the charges; but the person incriminated, who was a governess in very poor circumstances, relying upon the husband fighting the case, took no step to intervene.

Upon the case coming into the paper for hearing, the petitioner applied for a short adjournment; whereupon counsel for the husband informed the Court that he was not in a position to contest the desertion and adultery, but that he still denied and would contest the allegations of cruelty.

Thereupon an application was made to the Court on behalf of the person incriminated that she might have leave to intervene in the suit and defend herself against the particular charge of adultery in which her name was coupled with that of the respondent; and the Court accordingly gave her leave

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to intervene forthwith, and adjourned the case for a week to enable her to prepare her defence.

At the hearing, that charge of adultery was disproved, and no evidence was offered on the other charge of adultery, or as to the allegations of cruelty, but the petitioner gave evidence of desertion, and put in an order of justices founded upon desertion some years before; and she subsequently obtained an increased allowance of 35*s.* a week. The husband was a wool merchant and broker, and his income was stated to be about 265*l.* a year.

Upon the petition being dismissed, so far as the charges against the intervener were concerned,

*Newson*, for the intervener, urged that she should have a first charge upon the fund (40*l.*) in court, which had been provided by the respondent under order of the Court to cover the petitioner's costs of the hearing.

*Barnard*, for the petitioner, opposed. The Court has power to condemn the husband in the costs of the intervener.

*Priestley*, for the respondent, did not object to the intervener's application.

GORELL BARNES J., in granting the petitioner a decree of judicial separation on the ground of desertion, with costs against the respondent, said:—The only doubt I entertained was whether the intervener should not have an order both against the petitioner and the respondent for the costs of her intervention. No case was made against her, and if any suspicion of a case attached to her, which I do not think it really did, that has been entirely dispelled by her evidence. I ought to place the intervener in the best possible position to obtain payment of the costs which she has incurred, and rightly incurred, in defending herself. It would not have been so necessary for her to have intervened, if the husband had fought the case out, as he ought to have done. The expense of her intervention ought to fall upon him as well as upon the petitioner, and I therefore make an order against both the petitioner and the respondent to pay the costs of the intervener.

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Having regard to the conduct of the husband, I think that the petitioner must have an order for her costs, as I cannot say that her solicitor has acted improperly in laying the case before the Court, especially after the admission made in Court on the former occasion by counsel representing the husband.

Solicitors for petitioner: *Sandars & Harding, for Tunnicliffe & Salthouse, Bradford.*

Solicitors for respondent: *Corbin, Greener & Cook, for Beaumont, Wilson & Croft, Leeds.*

Solicitors for intervener: *Jaques & Co., for Neill & Holland, Bradford.*

H. D. G.

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C. A.

1902

*Dec.* 1.

[IN THE COURT OF APPEAL.]

## THE DUC D'AUMALE.

*Admiralty—Collision—Action in Personam—Practice—Writ—Foreign Co-defendant—Service out of Jurisdiction—"Necessary or proper Party"—Rules of Supreme Court*, 1883, *Order* XI., *r.* 1 (*g*).

A collision occurred in the English Channel, outside British territorial waters, between a British steamship and a French sailing vessel, which at the time was in tow of a British steam-tug. The French vessel was towed into a French port. The owners of the British steamship commenced proceedings in personam in England against the owners of the French vessel and the owners of the tug:—

*Held*, by the Court of Appeal (Collins M.R. and Mathew L.J.), affirming the decision of Gorell Barnes J., that after due service of the writ upon the owners of the tug, leave could be given, under Order XI., r. 1 (*g*), of the Rules of the Supreme Court, 1883, to issue a concurrent writ and serve notice thereof, out of the jurisdiction, upon the owners of the French vessel as being, within the meaning of the rule, proper parties "to an action properly brought against some other person (the owners of the tug) duly served within the jurisdiction."

APPEAL against a decision of Gorell Barnes J. refusing to discharge an order giving leave to issue a concurrent writ and serve notice thereof out of the jurisdiction under Order XI., r. 1 (*g*). (1)

(1) Rules of the Supreme Court, 1883, Order XI., r. 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may

The appellants (defendants under protest) were La Compagnie Maritime Française, owners of the French barque *Duc d'Aumale*. The respondents (plaintiffs) were the Marychurch Steamship Company, Limited, owners of the British steamship *Camrose*, and the other defendants were the Elliot Steam Tug Company, Limited, owners of the British steam-tug *Challenge*.

The facts were shortly as follows:—

On June 22, 1902, a collision occurred in the English Channel, outside British territorial waters, between the British steamship *Camrose* and the French sailing vessel *Duc d'Aumale*, which at the time was in tow of the British steam-tug *Challenge*. After the collision the *Duc d'Aumale* put into Calais and was subsequently towed to Dunkirk for repairs. The *Camrose* proceeded to Antwerp.

On July 2 proceedings were instituted in the Tribunal of Commerce at Nantes by the owners of the *Duc d'Aumale* against the owners of the *Camrose*. On July 11 the plaintiffs, the owners of the *Camrose*, issued a writ in personam against the owners of the *Duc d'Aumale* and the owners of the tug *Challenge*, claiming compensation against the defendants "as owners respectively of the steam-tug *Challenge* and the barque or vessel *Duc d'Aumale* for damage occasioned by a collision which took place in the month of June, 1902, between the plaintiffs' steamship *Camrose* and the barque *Duc d'Aumale* whilst in tow, or having been in tow, of the tug *Challenge*."

The writ was duly served on the owners of the *Challenge*, and on July 22 the plaintiffs applied ex parte, and, on August 8, obtained the leave of the President (Sir Francis Jeune) to issue a concurrent writ and serve notice thereof at Nantes on the owners of the *Duc d'Aumale*, on an affidavit, filed on behalf of the plaintiffs, that the owners of the French vessel were "necessary or proper" parties to the action brought against them and the owners of the British tug, "inasmuch as the plaintiffs allege that the said collision was caused or con-

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be allowed by the Court or a judge whenever—

"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

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tributed to by neglect or default in the navigation of the *Duc d'Aumale* and the *Challenge*." The notice of the writ was, on August 14, served on the owners in France of the *Duc d'Aumale* with twelve days' limit of time for appearance after service.

On August 20 judgment was given by the Nantes tribunal, by default, holding the owners of the *Camrose* responsible for the damage occasioned by the collision, and, under a convention (July 8, 1899) existing between France and Belgium for the enforcement of French judgments in Belgium, the *Camrose* would have been arrested at Antwerp had not the owners given security, in the nature of bail, without prejudice, for 250,000 francs, and it was alleged that after ninety days—that is, by November 18—the proceedings in France by default would become final.

On August 25 the owners of the *Duc d'Aumale* entered a conditional appearance under protest to the English writ, and on October 23 took out a summons in chambers to set aside the order giving leave to issue, and serve notice of, the writ. This summons was adjourned into Court and, on November 10, came on by way of motion, when it was contended on behalf of the owners of the *Duc d'Aumale* that the action was not, within the meaning of the rule, "properly brought" against the owners of the *Challenge*, as that tug had not been in collision, so that there was no cause of action against her owners, the object of commencing the action against the owners of the *Challenge* being to bring in the owners of the *Duc d'Aumale*, who were out of the jurisdiction, and who were sued in respect of a cause of action which arose out of the jurisdiction.

*Scrutton, K.C.*, in support of the motion, on behalf of the defendants La Compagnie Maritime Française, owners of the *Duc d'Aumale*.

*Pickford, K.C.*, and *Balloch*, for the plaintiffs, the owners of the *Camrose* contra.

The arguments of counsel fully appear from the judgment. In addition to the cases there cited, the following were referred

to: *The Elton* (1); *The Englishman and The Australia* (2); *The Avon and Thomas Joliffe.* (3)

GORELL BARNES J. The first point taken on behalf of the owners of the *Duc d'Aumale* is that the writ is issued against persons who are not "necessary or proper" parties to an action "properly brought" within the jurisdiction, for it is argued that the action is really and substantially brought against the French owners, and that the tugowners are only put on the record for the purpose of bringing in the French shipowners under Order XI., r. 1 (*g*). That argument is supported by the cases of *Flower* v. *Rose* (4), *Witted* v. *Galbraith* (5), and *Williams* v. *Cartwright.* (6) The view presented on the other side in substance is that there is an actual bonâ fide cause of action alleged against the tugowners as well as against the French shipowners, and that if the owners of both these vessels, the tug and tow, had been within the jurisdiction, they would both have been proper parties in a suit to recover for the damage done to the plaintiffs' ship, and that the tugowners in this case are not merely brought into the suit for the purpose of founding a right to proceed under the sub-section to which I have referred.

I am of opinion that in this matter the plaintiffs are in the right. I think that the action is properly founded against both defendants, if there is a bonâ fide charge of negligence against both sets of defendants, which is the case presented on the part of the plaintiffs, and therefore I do not think it can be said that the other defendants, the French owners, are either improper, or unreasonable, or unnecessary parties. Of course they are not strictly necessary parties—the words in the rule are "necessary or proper"—but they are "proper" parties to the suit brought in this Court against both, and I think, after listening to the cases cited by counsel for the owners of the French ship, that the reasoning of those cases is that the attempt was there made to bring into play the sub-section of

(1) [1891] P. 265.
(2) [1894] P. 239.
(3) [1891] P. 7.
(4) (1891) 7 Times Rep. 280.
(5) [1893] 1 Q. B. 431, 577.
(6) [1895] 1 Q. B. 142.

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the rule when there was no real cause of action against the persons who were within the jurisdiction, and it was only sought to bring the rule into play, if it could by possibility be done, in order to enforce a remedy against the persons who were not within the jurisdiction.

I do not think that I can usefully add anything to what I have said, except by referring to Lord Esher's judgment in *Massey* v. *Heynes* (1), where he says "the question whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this,—supposing both parties had been within the jurisdiction, would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction. This is the legislation on the subject, and we are bound by it."

There is this further point to make in a case of this kind, apart from what may happen in the future, if the plaintiffs succeed against the French shipowners in enforcing their rights. There can be no doubt that if this is a bonâ fide allegation of negligence against both sets of defendants, it is quite the proper and right thing that the whole matter should be fought out once for all with everybody present who was concerned with the accident. Therefore, unless this is a mere attempt to bring in the outside person not subject to the jurisdiction without a shadow of a right against the person who is within the jurisdiction, I think that it is quite a proper case in which the process should be allowed to go against both. There may be the ultimate difficulty in enforcing the judgment if recovered, and at the present moment there is the difficulty on the part of the present appellants in setting aside this writ and enforcing what I understand is a judgment recovered by them, in default of appearance, in France against the present plaintiffs. It appears by affidavit that some proceedings in France were instituted by the French company against the present plaintiffs, and an attempt is now being made to enforce that judgment in Belgium. I have not

(1) (1888) 21 Q. B. D. 330, at p. 338.

thought it necessary to adjourn this case in order to inquire what the rights of the parties are in Belgium, or to see what would be the result of the French suit; but it is a strong thing to say that the rights of the parties are to be precluded by default proceedings, and my decision, in the exercise of the discretion vested in me, is that the application on the part of the defendants, the French company, must be refused. The costs will be costs in the cause.

On appeal:—

Dec. 1. *Scrutton, K.C.*, and *Noad*, for the appellants (defendants), the owners of the *Duc d'Aumale*. Under the rules, service out of the jurisdiction is not allowed, unless the plaintiff, acting bonâ fide, has an apparent cause of action against the person served within the jurisdiction, and is not proceeding against the person who is served within the jurisdiction solely for the purpose of bringing in the person out of the jurisdiction—that is to say, in the terms of the rule, the person out of the jurisdiction must be "a necessary or proper party to an action properly brought against" the person within the jurisdiction, the test being whether the defendant within the jurisdiction would have been made, and would have been properly made, a party, if there had been no question of jurisdiction: *Witted* v. *Galbraith* (1), where the Court of Appeal set aside the order for service on shipowners residing in Scotland, on the ground that the action was not brought bonâ fide against the brokers of the ship residing in London, but only for the purpose of bringing in the owners in Scotland; see also the dissentient judgment of Lord Esher in *Williams* v. *Cartwright*. (2) In the present case the foreign ship happened to be in tow of an English tug; but the tug is the servant of the tow, so that there is no cause of action against the tug.

[COLLINS M.R. The tug may be independently liable, or the negligence may be joint.]

Yes; but with regard to independent liability the tug was

(1) [1893] 1 Q. B. 577. (2) [1895] 1 Q. B. 142.

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not in collision, and with regard to joint liability it is not enough to say that conceivably there may be some case against the tug: it must appear that there is a real cause of action; if, however, the owners of the tug limit their liability, it would not be worth while suing the tug, and, therefore, the owners of the *Camrose* have no interest in entering upon the question of joint liability; the owners of the tug are made defendants simply to bring Order XI., r. 1 (*g*), into play, and so be able to serve notice of the writ on the owners of the tow, that is, by means of the tug, to bring in the French ship.

[*Pickford, K.C.* The tonnage of the tug is not a minus quantity; her liability would work out at about 1000*l.*]

Secondly, the appellants, as plaintiffs in the Tribunal of Commerce at Nantes, have obtained judgment by default against the respondents, who are the defendants to those proceedings, and the decision is now final by reason of the expiration of ninety days. If the proceedings in this country are to go on there may be conflicting decisions.

[MATHEW L.J. The judgment by default in the foreign Court is not binding on this Court.]

Thirdly, the suit is in personam against foreign defendants in respect of a collision on the high seas—that is, in respect of a cause of action which did not arise within the jurisdiction of the Courts of this country, and, with reference to the existing rules, Lord Lindley, in *Witted* v. *Galbraith* (1), said: "The rules as to service out of the jurisdiction were recast in 1883 with great care, and the former rules on the matter were much limited"; but even under the rules of 1875 Lord Coleridge, in *Harris* v. *Owners of Franconia* (2), says: "The matter in respect of which this action is brought, therefore, happened beyond the jurisdiction of the Queen's Courts; and therefore I think Order XI., r. 1, does not enable a judge to order service of the writ out of the jurisdiction." And the learned judge goes on to refer to s. 527 of the Merchant Shipping Act, 1854, reproduced in the consolidating statute, 1894 (57 & 58 Vict. c. 60, s. 688), which only gives power to detain a foreign vessel that has occasioned damage to property when the foreign vessel comes

(1) [1893] 1 Q. B. at p. 579. (2) (1877) 2 C. P. D. 173, at p. 177.

within the jurisdiction; but if the service of the notice of this writ is allowed, there will be an assumption of jurisdiction to sue a foreigner in personam in respect of a tort on the high seas, though, as the vessel has not come within the jurisdiction, proceedings in rem cannot be instituted: *In re Smith.* (1) That would be an alteration of the rights of parties by means of rules of practice, but in *British South Africa Co.* v. *Companhia de Moçambique* (2) Lord Herschell said: "It has been more than once held that the rules under the Judicature Acts are rules of procedure only, and were not intended to affect, and did not affect, the rights of parties."

*Pickford, K.C.*, and *Balloch*, for the respondents (plaintiffs), the owners of the *Camrose*, were not called upon.

COLLINS M.R. It seems to me that the rule was framed with a view of excluding the cases put by the learned counsel who has just addressed us, because you could not have it more clearly expressed in language than it is in this sub-s. (*g*) of Order XI., r. 1: "Any person out of the jurisdiction" who "is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." So that the framers of the rule make the criterion due service within the jurisdiction. Not that the cause of action itself has arisen within the jurisdiction. If you get the "other person" duly served within the jurisdiction, then you have to shew that the person not within the jurisdiction is a necessary or proper party. The service, and not the cause of action, is made the criterion in this sub-section. With regard to the legal merits of the case, I have nothing to add to the judgment of Gorell Barnes J., which appears to me to cover the whole ground, and with which I entirely agree.

MATHEW L.J. I agree. The question here is whether one of the parties is a necessary or proper person within the meaning of the rule. There is no doubt that if these two persons were British subjects within the jurisdiction they could be sued together. One happens to be out of the jurisdiction,

(1) (1876) 1 P. D. 300. (2) [1893] A. C. 602, at p. 628.

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which is the case referred to in the rule. There is the service of the writ upon one within the jurisdiction, and this enables leave to be given to serve another person out of the jurisdiction who is a proper party to the litigation.

*Appeal dismissed with costs.*

Solicitors for appellants (defendants): *William A. Crump & Son.*

Solicitors for respondents (plaintiffs): *Thomas Cooper & Co.*

T. L. M.

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## THE TERGESTE.

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*Nov.* 10, 17; *Dec.* 1.

*Admiralty—Foreign Ship—Wages—Victualling Allowance—Repairs—Maritime Lien—Possessory Lien—Priority—Necessaries.*

Seamen on board an Italian vessel were engaged to serve at 40 lire per man per month, with a further sum of 40 lire per month in lieu of victualling. They remained by the vessel after she was taken into a shipwright's dry dock for extensive repairs, and, whilst there, the master, on behalf of himself and the crew, arrested the vessel in an action for wages and disbursements. The vessel was sold by order of the Court, and the crew sent back to their country; but the proceeds proved insufficient to meet the claim of the master and crew for wages, &c., and the claim of the shipwright for repairs. On the question of priority:—

*Held*, by Phillimore J., that the victualling allowance was equivalent to wages, carrying a maritime lien, and, therefore, the total claim of the master and crew for wages and disbursements up to the date of the vessel entering the dry dock, together with the cost of subsistence from the time of leaving the vessel until leaving the country, and the cost of repatriation ranked first, with costs, including in such costs such sum as the registrar should allow by way of subsistence money from the date of the writ to the time of leaving the vessel; then—following *The Gustaf*, (1862) Lush. 506, and *The Immacolata Concezione*, (1883) 9 P. D. 37—the common law possessory lien of the shipwright, based on his control over the vessel, displaced the maritime lien of the master and crew from the time of entry into the dry dock, and gave the shipwright priority in respect of his claim and costs, although the master and crew remained on board, and though the repairs ordered had not been completed.

ACTION in rem for wages and disbursements.

The plaintiff was Domenico Nicolo Berlingieri, suing on

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behalf of himself and all others the crew of the Italian steamship *Tergeste*. The defendant was the owner of the steamship, and, as against him, the proceedings were by default of appearance. The interveners were Rait & Gardiner, dry-dock owners and ship-repairers, who were also proceeding, by default, in rem for necessaries against the owner of the steamship. The facts were shortly as follows :—

On December 15, 1901, the plaintiff was engaged by the owner of the *Tergeste* to serve as master at a rate equivalent to 18*l.* per month, and victualling. On December 20 the crew signed on at Genoa, under Italian articles, at wages varying according to their rating, but averaging 40 lire per month, with (except the officers who were supplied by the ship) a further sum of 40 lire per month, if the master did not, on behalf of the ship, provide victualling, and making together 80 lire, equivalent to 3*l.* 4*s.* per month.

On March 9, 1902, the vessel arrived from Sulina in the port of London with a cargo of maize, and was arrested by consignees for alleged damage to the cargo; but the action was decided in favour of the ship. After discharging the cargo, the vessel being in need of repairs for sea damage, and to pass No. 2 survey, she was, on April 8, taken into Rait & Gardiner's dry dock at Cubitt Town, the master and crew remaining on board, and the crew doing repairs about the ship which it was alleged they could not be called upon to perform under the ordinary contract of service. On April 9, 11, 21, 24, and 28, the master, with the authority of the owner, who was at the time in London, gave five written orders for repairs, which were proceeded with; but in May Rait & Gardiner asked for 2000*l.* on account, and security for the payment of the remainder of the work to be done estimated at nearly 9000*l.* in all. The owner, finding the cost of reclassification would be heavy, abandoned the vessel as a constructive total loss to the underwriters, leaving the master and crew on board, and, no money being forthcoming, Rait & Gardiner on June 26 stopped work. On July 28 they issued a writ in rem against the owner of the *Tergeste* for dry-docking and repairs amounting to

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4161*l.* 3*s.* 8*d.*, and, on August 11, in default of appearance, they filed a statement of claim. (1)

On September 12 the plaintiff issued the writ in the present action for wages and disbursements. On September 24 he obtained, without prejudice to the rights of Rait & Gardiner, an order from the vacation judge for the appraisement and sale of the vessel, the payment of the proceeds into court, and payment out of 250*l.* to be applied primarily to the expenses of repatriation of the master and crew. From September 25 the expense of providing for the master and crew until the sale was defrayed by the marshal, and on October 15 the vessel was sold by the Court for 4050*l.* On October 16 the 250*l.* was paid over and, on October 18, the crew left.

On November 3 the plaintiff filed an amended statement of claim by which he claimed 1615*l.* 7*s.* 10*d.*, made up of 103*l.* 15*s.* 9*d.* liabilities incurred by him and disbursements on account of the ship; 433*l.* 5*s.* 8*d.* wages and victualling of himself and crew, less advances, up to April 8, and 929*l.* 6*s.* 5*d.* from that date to October 15, during which time it was alleged that the engine-room staff and the deck hands were engaged in repairs upon the vessel, in respect of which he claimed on their behalf a possessory lien; and he further claimed 149*l.* on the basis of the consular allowance for the expenses of himself and crew returning to Italy.

As the claim of the master and crew for wages, &c., and of Rait & Gardiner for repairs together reached the sum of 5526*l.* 11*s.* 6*d.*, whilst the net proceeds in court, after deduct-

(1) According to the statement of claim the plaintiffs, Rait & Gardiner, "supplied necessaries and equipment, and did repairs to the steamship *Tergeste* in the months of April, May, and June, 1902, at the port of London on the order of the master duly authorized in that behalf, the vessel being an Italian ship belonging to the port of Catania in Italy, and having no owner or part owner who was at the time of the commencement of the action or is domiciled in England or Wales." On December 1 the action came on by way of motion for judgment by default. On the authority of *The Albert Crosby*, (1870) L. R. 3 A. & E. 37, and *The Riga*, (1872) L. R. 3 A. & E. 516, the claim was treated as one for necessaries, and Phillimore J. gave judgment for the amount claimed with interest and costs.

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ing the marshal's expenses, only amounted to 3550*l.*, the question of priorities arose, and Rait & Gardiner accordingly, on October 29, intervened in the wages suit as parties interested in the fund in the registry, and relied on a possessory lien in respect of the sum of 4161*l.* 3*s.* 8*d.* for necessaries supplied and repairs done to the vessel; but they admitted that 288*l.* 0*s.* 3*d.* was due to the master and crew for wages up to April 8, and that, as against the fund realized by the sale of the vessel, these wages, together with the expenses of returning home, and subsistence money between the date of leaving the ship and departure from this country, ranked prior to their claim. They further admitted that the wages of the master and crew between April 8 and October 15 amounted to 577*l.* 7*s.* 7*d.*; but they denied that the master had made any advances for necessaries before April 8, denied that the crew had done any work upon the ship whilst in dry dock or that they had a possessory lien in respect thereof, and denied that the crew were entitled to 122*l.* 15*s.* 5*d.*, up to April 8, and 33*l.* 12*s.* from that date to October 15, by way of victualling allowance equivalent to wages and carrying a maritime lien.

Nov. 10, 17. *Laing, K.C.*, and *Denis O'Conor*, for the plaintiff, the master, suing on behalf of himself and the crew of the *Tergeste*. It is admitted by the interveners that the sum claimed for wages to April 8 is correct and takes priority; but it is denied that the 40 lire per month paid to each seaman in lieu of victualling is equivalent to wages carrying a maritime lien. It is, however, submitted that as the master, in his discretion, either provided provisions for the crew or paid the 40 lire to each seaman in order that he might find his own, the payment was in fact wages, and is recoverable in priority as such.

The interveners further allege that the crew are not entitled to wages in priority from April 8 up to the date of the writ, on the ground that they have a possessory lien for their account; but the claim of the master and crew for wages, after April 8, ought not to be postponed, for the possessory lien of a shipwright does not attach until the work is completed

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and the price agreed upon, otherwise there would not be any right of action corresponding to the lien claimed. Rait & Gardiner, however, not only declined to go on with the work, but, in fact, though items of work were done, never completed any one of the five written orders for repairs given by the master, and on April 8, when it is alleged that the possessory lien arose, no work had been done, so that no claim for money due had arisen on which to found the lien. Again, for the validity of a possessory lien it is necessary that the chattel be in the exclusive possession and control of the contractor; secondly, that the work be done at the request of the owner or agent; and, thirdly, that the work shall have been completely performed: *Pinnock* v. *Harrison* (1), unless the performance is prevented by the owner: *Lilley* v. *Barnsley* (2); see Fisher on Mortgage, 5th ed. s. 623.

In the present case the chattel was not in the exclusive possession and control of the contractor, for there was no ship-keeper until the marshal placed his subordinate on board, and the master remained in possession on behalf of the owner of the vessel, whilst the crew had a possessory lien in respect of the work they did on the vessel during the time that she was in dry dock. Secondly, the repairs were not completed, though their completion was not prevented by the owner. As the crew are entitled to claim their wages until legally discharged, and as they were justified in staying by the ship until paid off, their maritime lien ran on up to the sale of the vessel. At any rate, it is the practice of this Court, in the case of a foreign ship, to make an allowance by way of costs for detention and subsistence money from the date of the institution of the suit to the date of the decree: *The Carolina.* (3)

*Aspinall, K.C.*, and *L. F. C. Darby*, for Rait & Gardiner, intervening. Assuming that priority may be claimed by the master in respect of his disbursements, and by the master and crew in respect of their wages up to April 8, together with the actual cost of their journey home and subsistence money from the time of their leaving the ship to that of their leaving the

(1) (1838) 3 M. & W. 532, per Parke B. at p. 535.

(2) (1844) 1 C. & K. 344.

(3) (1875) 3 Asp. M. L. C. 141.

country, it is submitted that from the time when the vessel was placed in the dry dock of the interveners their possessory lien displaced the maritime lien of the master and crew, so that the interveners are entitled to be paid their claim before the balance claimed by the master and crew: *The Gustaf* (1), in which case the facts shew that the master and crew remained on board; see also *The Immacolata Concezione.* (2)

If the Court should find that the 40 lire per month for victualling was a substitute for wages, then it would be difficult to contend that this claim would not carry a maritime lien along with the wages up to April 8; but after that date the possessory lien of the shipwright takes precedence, and it is immaterial that the work was not completed, for there was no contract to do the whole repairs and make no demand until they were completed, so that the shipwright was entitled to say, in the words of Lord Tenterden C.J. in *Roberts* v. *Havelock* (3), "that he would proceed no further with the repairs till he was paid what was already due."

[They were stopped by the Court.]

*Laing, K.C.*, in reply.

[Reference was made to the following cases: *The Scio* (4); *Ex parte Willoughby* (5); *The Harmonie* (6); *Ross* v. *Baxter.* (7)]

PHILLIMORE J. The Italian steamship *Tergeste* was arrested by the marshal of the court in an action for wages and disbursements brought by the master on behalf of himself and the crew. At the time she was arrested the firm of Rait & Gardiner, ship-repairers, claimed to have a common law possessory lien on the ship for work which they had done. The ship was sold in the wages action, and, as the proceeds in Court are insufficient to meet the total amount of both claims, the question has arisen between the master and crew on the one side, and Rait & Gardiner on the other, as to which should have priority.

(1) Lush. 506.
(2) 9 P. D. 37.
(3) (1832) 3 B. & Ad. 404; 37 R. R. 452.
(4) (1867) L. R. 1 A. & E. 353.
(5) (1881) 16 Ch. D. 604.
(6) (1841) 1 Wm. Rob. 178.
(7) (1885) 13 R. 185.

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It is not disputed that the master and crew are entitled to priority for their wages up to the date the ship was put into the dry dock of Rait & Gardiner, which was on April 8; but I have to decide what is meant by their wages, and I come to the conclusion that what is called the victualling money or allowance of 40 lire per man per month in respect of victualling is part of his wages. Therefore the master and crew should not only have the sum given them for their wages, but also the sum given to the crew in consideration of their finding their own provisions, and I do not think, that being allowed, there is any serious dispute as to the amount due for wages to the master and crew. The crew are also entitled to their viaticum home, and I understand that counsel for the material man are ready to accept as correct the figures in the captain's account as to the way in which he spent the 250*l.* paid by the marshal to him on behalf of himself and crew under an order of the vacation judge. To that must be added, I think it was said to be 8*l.*, for the captain's journey home. I do not think that the crew are entitled, at any rate, in priority to the material man, to any allowance for subsistence money, from the time when they issued their writ to the time when they were provided for by the marshal. It may be that the registrar will allow some sum in respect of costs according to whatever is the usual rule in those matters. That I leave entirely to him.

The captain's disbursements previous to the time when the ship was put into dry dock are claimed at the sum of 87*l.*, and I understand that there is no serious conflict about that. Those items, therefore, are in the first instance to be paid out of the fund in court.

The view which the Admiralty Court took with regard to conflicting claims by shipwrights having a possessory common law lien, and claims which have been sustained by process in the Admiralty Court, has been well established, and has been accepted by this Division of the High Court of Justice. It is that it is the duty of the material man not to contend with the Admiralty marshal; to surrender the ship to the officer of the Court, and let the officer of the Court, under the order of

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the Court, remove and sell her; but when he has done that, the Court undertakes that he shall be protected, and that he shall be put exactly in the same position as if he had not surrendered the ship to the marshal. The Court has further decided in the case of *The Gustaf* (1) that the possessory lien of a shipwright is subject to maritime liens attaching prior to the ship being taken into the shipwright's yard. If there is a possessory lien, that possessory lien takes precedence of all maritime liens for claims which accrue after the date when the possessory lien begins. The only doubt that Butt J. had in the case of *The Immacolata Concezione* (2) was whether *The Gustaf* (1) was not too favourable to the claimants under a maritime lien. There is no doubt here when the possessory lien began; it began when the ship was put into dry dock. It is perfectly true that for some days there was no money in respect of which the lien would operate; but if Messrs. Rait & Gardiner had such possession as to give them a possessory lien at the date when the ship was taken by the Admiralty marshal, they had it for the price of the whole of the work which they had done up to that time.

It is said that they had no possessory lien, because the master and crew were on board; if that were the rule a great number of shipwrights' liens would be disturbed. That man has a lien who has such control of the chattel as prevents it being taken away from his possession. He may admit other persons or workmen to access to the chattel, and other tradesmen may claim a possessory lien over the chattel or part of it, but if it cannot be got out of the dock or yard without the consent of the owner of the dock or yard, the owner of the dock will have a possessory lien, though perhaps not the only one, on the chattel, which he can enforce, and which the Court has taken upon itself to enforce for him as against subsequent claims. I have no doubt in this case that Rait & Gardiner had an ample possessory lien.

Then comes the next point, Had any money accrued to them? It is said, No, because they had not completed any one of the five orders which they had received. There the law follows

(1) Lush. 506. (2) 9 P. D. 37.

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good sense and business, as shewn by the case of *Roberts* v. *Havelock*. (1) A man who contracts to do a long costly piece of work does not contract, unless he expressly says so, that he will do all the work, standing out of pocket until he is paid at the end. He is entitled to say, "That is not my contract; it is quite true that I had contracted to do the work and I am bound to do it; but there is an understanding all along that you are to give me from time to time, at reasonable times, payments for work done, and if the contract here was to do certain work, it always included that term, to do it if we are paid reasonable sums in part payment as we go along, not an advance, but in part payment for work already done before we proceed to the next thing"; and if that payment is not made, then the shipwright, or any other artificer, is entitled to review his work, and say, "I have done work worth so much; true I have contracted to do other work, but it is not reasonable I should do it as I have not been paid, and in respect of work I have done I claim payment."

In my judgment Messrs. Rait & Gardiner had here a possessory lien for the work which they had done, though they had not finished all the work. They might have asked for payment on account, as they were entitled to do. They have a possessory lien on all the work they have done, and that lien takes precedence of any claim, even a maritime lien, which has accrued since the ship first came into the possession of Messrs. Rait & Gardiner.

The result, therefore, is that the plaintiffs, master and crew, will be entitled to their wages to April 8, to the money in the form of wages which takes the shape of compensation for provisions up to the same date, to their viaticum home, including the viaticum to the captain, and to the captain's disbursements up to that date; after which must come the claim of Messrs. Rait & Gardiner, and as that will probably swallow up all that is left, it is unnecessary to discuss anything further. Still, as a matter of form, the master and crew should, I suppose, have judgment for their later wages. The costs will be added in each case, and come out of the fund, and

(1) 3 B. & Ad. 404; 37 R. R. 452.

there will be no reference unless some ground is given for one, and if any of the parties make an unnecessary application for a reference they will have to pay the costs.

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Solicitors for plaintiff, the master, on behalf of himself and the crew of the *Tergeste*: *Ince, Colt & Ince.*

Solicitors for interveners: *Simpson, Cullingford, Partington & Holland.*

T. L. M.

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*Dec.* 3, 8.

*Admiralty—Damage to Cargo—Negligence of Stevedore in Discharge—Charterparty—Exceptions—"All other Accidents"—"Negligence of Servants . . . . in the Management or Navigation of the Vessel or otherwise."*

Sugar in bags was shipped under a charterparty exempting the shipowner from liability for loss or damage arising from the usual perils "and all other accidents even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors or other servants of the owner in the management or navigation of the vessel or otherwise."

In the process of discharge stevedore's men, employed by the ship, recklessly used hooks which tore the bags, and carelessly allowed the bags to be cut by the slings and to burst through striking against the hatchcoamings whilst being lifted out of the hold. In an action by the charterer for damage to and short delivery of the sugar:—

*Held*, by Phillimore J., that, whether the loss in the course of the discharge of the cargo was due to the spilling of the sugar or was caused by the damage to the bags, the shipowner was not liable, for the spilling of the sugar and the tearing of the bags were accidents brought about by negligence, and, therefore, within the meaning of the exception "accidents . . . . caused by negligence . . . . of the servants of the owner" "otherwise" than "in the management or navigation of the vessel."

ACTION by plaintiffs, Piettre Frères of Paris, to recover the sum of 178*l.* 4*s.* 5*d.* in respect of damage to and short delivery of a cargo of 796 tons of sugar in bags shipped on board the defendants' steamship *Torbryan* at Dunkirk for delivery in London.

The facts were shortly as follows:—

The vessel left Dunkirk on February 5, 1902, and arrived in the Thames February 6, where she was moored to buoys off

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the Trade Wharf, London, and, on February 7 to 12, her cargo was discharged into lighters by stevedore's men employed by the ship.

According to the particulars of breaches of contract and duty, delivered in the City of London Court before the action was transferred to the High Court, the plaintiffs' claim consisted of 9*l.* 6*s.* 2*d.* for seven bags missing, 3*l.* 6*s.* 2*d.* for seven bags damaged by coal dust, 7*l.* 19*s.* 5*d.* cost of repairing bags, and 158*l.* 2*s.* 8*d.* damage and loss of weight. The defendants, after action brought, paid the plaintiffs 12*l.* 12*s.* 4*d.* in respect of the first two items, and admitted the shipment in apparent good order and condition, and also the weight of the bags shipped on the terms of bills of lading, dated February 4, 1902, but they contended that the damage, if any, was caused by the bags being too thin and weak, and not fitted for the carriage and handling of the sugar, and they further relied upon the exceptions in the French charterparty, dated January 30, 1902, incorporated by the bill of lading. The negligence clause of the charterparty, according to an agreed translation, ran :—

"Act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates or robbers, strikes, arrests or restraints of princes, rulers, and peoples, collisions, stranding, and all other accidents excepted, even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors, or other servants of the owner, in the management or navigation of the vessel or otherwise."

In the course of discharge the marks of the various parcels were found to be mixed up, involving a considerable amount of shifting and turning over of bags, and reports were from time to time made by the lightermen who received the parcels of cargo deliverable in their respective barges at Carbutts', St. Johns, and the Baltic wharves, that the cargo was being roughly handled, and, in particular, that by the reckless use of hooks the bags were torn so that the dry granulated sugar ran out, and that further spilling of sugar was caused by the bags being cut by the slings, and by the seams bursting through striking against the hatch-coamings whilst being lifted out of the hold. Complaints based on these reports were made

during the discharge by the agents of the consignees to the agents of the shipowners.

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Dec. 3. *Scrutton, K.C.*, and *Balloch*, for the plaintiffs, the charterers and owners of the cargo of sugar. As the goods were shipped in good order under the bill of lading incorporating the charterparty, to be delivered in the like good order, and the shipowner has delivered them in a damaged condition, he has failed to carry out his contract, for the bags were reasonably fit for the purpose, and the exceptions in the charterparty do not apply to the case of an improper and negligent mode of discharge.

[PHILLIMORE J. I am satisfied on the evidence that the bags were sufficient, and that the damage to the bags and the loss of part of their contents were due to negligence in the handling and discharge of the cargo by the stevedore's men.]

*Carver, K.C.*, and *A. E. Nelson*, for the defendants, the owners of the *Torbryan*. Assuming the finding of fact against the defendants that there was negligence on the part of the stevedore in the discharge of the cargo, still the shipowner is not liable under the contract of carriage contained in the charterparty, for the spilling of the sugar in the course of the handling of the bags by the servants of the owner, that is, by the stevedore's men, is covered by the words "all other accidents," and the words "or otherwise" include the discharge of the cargo, so that the damage to the bags and the spilling of the sugar were "other accidents" "caused by negligence" of "servants of the owner."

Whether the damage to the bags was caused by the improper use of hooks in handling them during the discharge, or whether the bags burst through their being allowed to strike the hatch-coamings whilst being lifted out of the hold, the loss of the sugar was not intentional: it was an "accident," and none the less an accident because it was caused by negligence.

In *Baerselman* v. *Bailey* (1) a part of the cargo was damaged by being negligently stowed by a stevedore employed by the shipowner, and it was held that the words "or otherwise" in

(1) [1895] 2 Q. B. 301.

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the bill of lading were general, and did not limit the exemption to loss or damage arising from negligence in matters akin to navigation, or to loss or damage arising from negligence in relation to the other excepted perils of the bill of lading, that is to say, the shipowner had, by the ordinary grammatical construction of the language, absolved himself from liability for the consequences of the negligence of his servants.

What was there decided with reference to the stowage of the cargo by a stevedore must equally apply to the discharge of the cargo by a stevedore. In *Norman* v. *Binnington* (1), where the shipowner was responsible for the act of a person who, after the shipper's goods had been received on board, negligently exposed them to rain, it was held that the words "or otherwise" in the bill of lading referred to negligence in bringing about excepted loss or damage other than loss or damage caused in negligently navigating the ship, and, therefore, that the shipowner was not liable. In *Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (2), where the engineer, intending to fill the ballast tank with water, by mistake opened the valve of the tank in which the goods were being carried, Walton J. said, "damage arising from the negligence of a servant is an accident," and the shipowner was held not liable by reason of the exception of a peril of the seas arising from the negligence of a servant. In *Hamilton* v. *Pandorf* (3), where a rat gnawed a hole in a pipe whereby sea-water damaged the cargo of rice, the shipowner was held not liable on the ground that the damage was within the exception "accidents of the seas," and Lord Macnaghten in his judgment says, "the accident which caused the damage was one of the excepted perils or accidents." In *The Cressington* (4), where the cargo was damaged by sea-water in consequence of a rivet in the foot of a bulwark stanchion working loose, and the master negligently omitting to stop the leak, the shipowner was held not liable on the ground that the inflow of water was an "accident" of navigation, and the

(1) (1890) 25 Q. B. D. 475.
(2) [1902] 1 K. B. 290, at p. 295.
(3) (1887) 12 App. Cas. 518, at p. 530.
(4) [1891] P. 152.

negligence of the master in respect of it was covered by the exception "accidents of navigation even when occasioned by the negligence of the master." Lord Hannen in his judgment observes that the "negligence on the part of the master was peculiarly such an accident of navigation as it was intended to guard against."

*Balloch*, in reply. The primâ facie liability of the shipowner for the damage to the cargo is not removed by the exception relied on, for though the words "or otherwise" in *Baerselman* v. *Bailey* (1) were held to include the loading of the cargo, the form of the negligence clause was different to that in the present case. It ran, "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship or otherwise" —that is to say, negligence in navigating the ship "or otherwise" was expressly excepted; but here the shipowner, in order to exonerate himself from liability for the damage to the cargo during the discharge by the stevedore, must bring himself within the earlier part of the clause, "perils of the seas . . . . and all other accidents."

The persistent negligence of the stevedore's men, after warning, cannot be deemed an "accident," for, in the words of Lord Halsbury in *Hamilton* v. *Pandorf* (2), "accident" involves the "idea of something fortuitous and unexpected"; and here, in order to claim the benefit of the exception, it must not only be an "accident," but an accident ejusdem generis with the matters previously enumerated, as in the case of *In re Richardsons and M. Samuel & Co.* (3), where the late Master of the Rolls said, "there must be some limitation put upon these words, otherwise the words that precede would be mere surplusage." In that case the shipowner was held entitled to claim for the detention of his ship on the ground that the charterer was not exonerated by the general clause in the charterparty excepting "other causes beyond charterer's control." These words were considered to refer to matters ejusdem generis with the antecedent exceptions, and did not

(1) [1895] 2 Q. B. 301. (2) 12 App. Cas. 518, at p. 524.
(3) [1898] 1 Q. B. 261, at p. 266.

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include delay arising from the charterer not being able to get men enough to load the vessel in the stipulated time.

In *Owners of Cargo on Board SS. Waikato* v. *New Zealand Shipping Co.* (1) the bill of lading contained the exception, "defects latent on beginning voyage or otherwise"; but it was held that the words "or otherwise" could not be read so as to cover the case of the holds being so fitted as not to be capable of proper ventilation, for, as the late Master of the Rolls remarks in his judgment: "There is ample authority that exceptions in a bill of lading must be clear and unambiguous if the shipowner is to be relieved from the liability which he has otherwise undertaken therein." Here the onus is upon the shipowner to shew that he has excluded his common law liability; but the cases relied on by the defendants all involve some additional factor to constitute the "accident," and none of them deal with the handling of the cargo in the course of discharge.

*Cur. adv. vult.*

Dec. 8. PHILLIMORE J. The plaintiffs are the owners of 8000 bags of sugar shipped on the steamship *Torbryan* at Dunkirk for delivery in London upon the terms of a charter-party in the French language, of which I have an agreed translation. They sue in respect of four heads of damage—seven bags short delivery, 9*l.* 6*s.* 2*d.*; seven bags damaged by coal dust, 3*l.* 6*s.* 2*d.* (which two sums have been paid since writ); loss by spilling from bags, 158*l.* 2*s.* 8*d.*; cost of repairing bags, 7*l.* 19*s.* 5*d.* These two latter claims are in question.

I have no doubt as to the facts. The cargo was brought over in sufficient bags. Some were torn in the sides by hooks which the stevedores improperly and recklessly used in the course of discharge. Some were cut through from below by the slings owing to the sets being violently knocked from underneath against the deck or the coamings of the hatch in the course of their being carelessly lifted out of the hold. It is possible that in a few cases the bags burst at the seams through the same violent contact. From the holes and at the burst

(1) [1899] 1 Q. B. 56, at p. 58.

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seams fine crystallized sugar spilt in the process of moving. Some was saved clean and put back into the bags, some was saved in a damaged condition and sold for an inferior price as sweepings, and a good deal was lost. The net loss was properly put by the plaintiffs at 158*l.* 2*s.* 8*d.*, and they properly spent 7*l.* 19*s.* 5*d.* in repairing the bags, and thus saving further loss. The acts and omissions of the stevedores which caused these losses were negligent and improper; the stevedores were the servants of the shipowner, and he is responsible to the plaintiffs unless he is protected by the charterparty. There is one other fact which might on a possible construction of the charterparty be material—namely, the proportion of loss due to either of the two causes, tearing by the hooks or violent contact. I have no means of apportioning between these two causes, and it was agreed at the trial that if such apportionment should ever become necessary it should be ascertained in some subsequent proceeding, either by a reference to the registrar or otherwise.

The material clause of the charterparty is as follows: "Act of God—fire—perils of the seas—barratry on the part of the captain or crew—enemies, pirates or robbers—strikes—arrests or restraints of princes, rulers, and peoples—collisions, strandings—and all other accidents excepted, even though caused by negligence, fault, or error of judgment on the part of the pilot, captain, sailors, or other servants of the owner in the management or navigation of the vessel, or otherwise." Protective clauses of this kind are now well established in commerce, and business is conducted on the footing of their existence, and Courts of justice must, and do, give full effect to them. But the position is artificial, the steps by which the Court reaches the construction are made up of arguments finely drawn, and the conclusion is of necessity strange to the plain man, who is neither lawyer nor merchant.

The defendants contend that the loss sued for is upon the facts which I have found to be considered to be due to an "accident" "caused by negligence of servants of the owner" "otherwise" than "in the management or navigation of the vessel."

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I propose first to deal with the word "otherwise." The plaintiffs say that this word means something very like management or navigation, and they rely upon the cases of *In re Richardsons and M. Samuel & Co.* (1) and *Owners of Cargo on Board SS. Waikato* v. *New Zealand Shipping Co.* (2) The defendants say that this word introduces, at any rate, something in addition to management and navigation, and they rely upon the case of *Baerselman* v. *Bailey.* (3) I think both contentions are of force, but the result of the two is in favour of the defendants. "Navigation" is the bringing of the ship with the cargo on board from port to port. "Management" covers such matters as opening and closing the hatches to secure ventilation or protection from weather, and such exceptional duties with regard to the cargo as may be imposed upon the master of the ship in certain events upon the authority of the case of *Notara* v. *Henderson.* (4) What is naturally left for the word "otherwise" except the receiving and delivery of the cargo?

Then comes the question—Is this loss due to an "accident caused by negligence"?—a question, to my mind, far more difficult. I have considered the cases of *Hamilton* v. *Pandorf* (5), *The Xantho* (6), *The Cressington* (7), and *Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (8), which, apparently, contain the law upon this subject.

On the whole I think that the loss here should be deemed for the purposes of the charterparty to be caused by the spilling of the sugar, and that this spilling was an accident. The other view would be that the loss was caused by damage to the bags, and that it would be necessary for the defendants to prove that the damage to the bags was accidental. Even taking the case at this stage, I think the defendants should succeed. I have not much doubt that they should succeed as to those bags which were damaged by the striking against the deck or hatch-coamings. That striking, though due to careless working, was clearly accidental. The loss from these bags was, in my view,

(1) [1898] 1 Q. B. 261.
(2) [1899] 1 Q. B. 56.
(3) [1895] 2 Q. B. 301.
(4) (1872) L. R. 7 Q. B. 225.
(5) 12 App. Cas. 518.
(6) (1887) 12 App. Cas. 503.
(7) [1891] P. 152.
(8) [1902] 1 K. B. 290.

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due to an accident, the spilling, caused by an accident, the striking, which was brought about by negligence. As regards the damage caused by the hooks, I have had more doubt. All use of such hooks as were used was wrongful, and was likely to be injurious; but it did not follow that the hooks each time they were used tore one of the bags. Here, again, I think upon the whole that there was a loss by accident, the spilling, caused by another accident, the tearing, due to negligence in shifting the bags with hooks. In this way I arrive at a double accident in the chain of consequences in each case; but a single accident is sufficient for the defendants.

It was urged upon me that very early in the course of delivery, and repeatedly afterwards, complaint was made of and to the stevedores of their improper working in both respects, and it was contended that their persistence after warning removed the subsequent mischiefs from the category of accidents. The fact is true, but I cannot accept the inference sought to be drawn from it. The stevedores were reckless, and it may be said wanton, but they were not wilful. They did not intend to damage or destroy; they intended to hurry over the discharge, and to take their chance of doing or not doing damage. They handled many bags without damaging them. The balance were damaged, and as each bag was damaged it was an accident, though no doubt not an unlikely one. There must be judgment for the defendants except as to the two small claims which have been paid since writ. I regret that it should be so.

There will be no costs on either side up to the date of the payment of the two small claims. After that date the defendants are entitled to the general costs of the action; but as they have raised unnecessary issues as to the facts, upon which I am clearly against them, they will have to pay the costs of those issues to be deducted from the general costs of the action.

*Judgment for defendants.*

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*
Solicitors for defendants: *Lowless & Co.*

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Oct. 27;
Nov. 5, 24, 27.

## THE TAGUS.

*Admiralty—Foreign Ship—Wages—Disbursements—Mortgage—Lex loci—Lex fori—"Privileged Debt"—Maritime Lien—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 167.

In proceedings in rem by the foreign master of an Argentine vessel in an English port, the claim of the master consisted of—(1.) wages as supercargo, and afterwards as master; (2.) disbursements whilst acting as supercargo, and afterwards as master. On the question of priority as against a mortgagee intervening:—

*Held*, by Phillimore J., that, though by the lex loci the master could only claim his wages and disbursements for the last voyage as a "privileged debt" in priority to the mortgagee, the question was one of remedy, and therefore the lex fori applied, under which, by reason of the maritime lien conferred by s. 167 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), he could claim, in priority, the whole of his wages and disbursements whilst master. He was also entitled to add thereto his wages as a seaman whilst acting as supercargo, and such disbursements as he had then made by way of advances to the crew on account of their wages.

*The Milford*, (1858) Sw. 362, discussed.

Action in rem for wages and disbursements.

The plaintiffs were Miguel N. Savas, the master, and the crew of the steamship *Tagus*. The defendant was the owner of the steamship and her freight, and as against him the proceedings were by default. The interveners were Cesarina Molteni de Ortelli, Enrique José Meincke, Luis Meincke, Emilio Meincke, and Angel Gardella, mortgagees.

The facts were shortly as follows:—

On September 29, 1902, the *Tagus*—an Argentine iron screw steamship belonging to the port of Buenos Ayres, of 1366 tons gross register—arrived from Alexandria at Sharpness with a cargo of cotton-seed; and on October 3 the master was served with a notice by the above-named interveners, and possession taken of the vessel on their behalf, as mortgagees under a mortgage deed executed at Buenos Ayres, June 19, 1901, to secure the sum of $30,000, alleged to be then due in respect of repairs done and necessaries supplied to the *Tagus*. On October 4 the mortgagees commenced proceedings in personam

in the Liverpool District Registry for foreclosure and sale; but the owner, who was served on board, did not appear to the writ. On the same day, the discharge of the cargo being completed, payment of the balance of freight, about 60*l.*, was demanded of the consignees on behalf of the mortgagees. On October 9 an action in rem was commenced, in the Gloucester County Court, by stevedores of Sharpness, claiming 64*l.* 3*s.* for discharging cargo. To this action the mortgagees entered an appearance as interveners, and on October 13 they obtained an interim injunction from the vacation judge restraining the owner of the *Tagus* from removing her out of the jurisdiction. On October 21 the master and crew commenced the present action in the High Court, and on October 23 arrested the vessel to recover 2070*l.* 14*s.* 8*d.*—namely, 1182*l.* 11*s.* 3*d.* wages of the master and crew, including maintenance money and the cost of returning to Buenos Ayres, and 888*l.* 3*s.* 2*d.* disbursements by the master.

As other proceedings were also commenced for necessaries supplied to the vessel, Gorell Barnes J., on October 27, on motion by the plaintiffs in the mortgage action, transferred all the actions to the High Court, and on November 5 made an order on motion in the present (wages) action for the appraisement and sale of the vessel, reserving all questions of priority. On the vessel coming into the marshal's hands for sale the mortgagees withdrew their watchman, entered a caveat against the payment out of proceeds, and intervened in the present action. They admitted the service of the plaintiffs as master and crew of the *Tagus*, and, subject to a reference as to the amounts due, they admitted the claim of the crew for their wages, which was limited to the last voyage of the vessel; but they disputed the claim of the master on the ground, inter alia, that by Argentine law he could only recover wages and disbursements for the last voyage. (1)

(1) The following is the translation used in court of the articles of the Commercial Code embodying the Argentine maritime law, which were referred to by an advocate practising at Buenos Ayres, and called on behalf of the mortgagees intervening in the present wages action:—

Art. 947: "When during the voyage the captain finds himself without

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The master, M. N. Savas, claimed wages from December 1, 1900, when, not being a qualified master mariner, though a seafaring man, he was engaged by his brother, the owner of the vessel, to serve in a capacity equivalent to supercargo (in Portuguese "commissario"); but it was arranged that he should practically supersede the master, who remained on board at mate's wages. In September, 1901, M. N. Savas obtained a master's certificate. In November the actual master left, and on December 1, 1901, M. N. Savas was appointed master, making coasting voyages, and, in March, 1902, left Buenos Ayres, incurring expenses in the shape of

funds belonging to the ship or its owners, and none of these latter, their attornies or consignees, being present, or failing them some one interested in the cargo, or even if they are present and do not facilitate the necessary funds, the captain may contract debts, take money on bottomry upon the hull, keel and appurtenances, and even, in the absolute absence of other resource, sell the merchandise of the cargo, declaring in the documents he may sign respecting the liabilities the cause from which these arise."

Art. 948: "In order that the measures authorized in the preceding article may take place, it is indispensable—

"(1.) That the captain proves an absolute lack of funds in his possession, belonging to the ship or its owners;

"(2.) That the owner of the ship, his attornies or consignees, or failing them any one of the interested parties in the cargo were not present, or being present they were requisitioned without result; . . . ."

Art. 1375: "The following credits are privileged on the freight, and they will concur in the amount thereof in the order in which they are laid down as under:—

"(1.) Legal expenses incurred in the common interest of the creditors.

"(2.) The expenses, indemnities, and wages for assistance and salvage owing from the last voyage.

"(3.) Wages, fees, and indemnities, due, in conformity with the dispositions of this book, to the captain and other members of the crew for the voyage in which the freight is earned. . . ."

"These privileges cease as soon as the freight is paid, except in the case of art. 998, in which the privilege for the crew's wages is only extinguished six months after the revocation of the voyage."

Art. 1376: "Ships or parts thereof are affected, even though they be in the possession of a third possessor, for the payment of credits which the law declares privileged, in the manner and with the limitations set forth in the following articles."

Art. 1377: "(7.) Wages, fees, and indemnities due, in conformity with the dispositions of the present book, to the captain and other members of the crew for the last voyage."

disbursements on account of the vessel during this last voyage; but the claim also included advances made to the crew on account of their wages previously.

Nov. 24, 27. *Aspinall, K.C.*, and *Lauriston Batten*, for the plaintiffs, the master and crew of the *Tagus*. As the crew are only claiming their wages for the last voyage, they are entitled in priority to the mortgagees, whether the lex loci or the lex fori applies. As regards the rest of the claim, the question being one of remedy, it has been long settled that, under the lex fori, the master of a foreign ship can proceed for his wages, and, since 1889, for his disbursements also, in this Court, whether the law of his flag gives him a lien or not upon the ship or freight. The disbursements in the form of wages advanced to the crew whilst the master was acting in the capacity of supercargo can also be claimed as he is entitled to stand in the shoes of the seamen, who could have arrested the vessel: *The William F. Safford.* (1)

*Laing, K.C.*, and *Maurice Hill*, for the mortgagees intervening. By art. 1375 of the Argentine Code, wages due to the master and crew constitute a privileged claim on freight for the voyage on which the freight is earned, and, by art. 1377, the ship is liable in respect of the wages of the master and crew for the last voyage—that is to say, wages earned previously do not constitute a "privileged debt" and only come in after all the privileged claims have been satisfied, though the owner can be sued. By art. 1366 a mortgagee comes in after privileged claims, and before general creditors, the result being that, if the master does not recover from the owner the money he has advanced seamen on previous voyages, he cannot subsequently treat such disbursements as privileged claims against the ship, and he is equally barred in respect of his own wages. If, therefore, the lex loci applies, so much of the master's claim for wages and disbursements as relate to previous voyages must, on the reference, be struck out, the process being in rem.

Secondly, a master can only claim against his ship for

(1) (1860) Lush. 69.

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disbursements from the date on which he is placed on the ship's register as master: *The Albion* (1); and, therefore, the plaintiff in any case cannot make any claim under this head until he was appointed master.

Assuming, however, that, as the question is one of remedy, the lex fori applies, by that law, the foreign master of a foreign ship has no lien. Until 1844 no master had any lien upon the ship or freight for his wages or disbursements; but by s. 16 of 7 & 8 Vict. c. 112, in respect of wages, the master of a British ship acquired a remedy in the case of the bankruptcy of the owner. This section was repealed, and re-enacted with additions, by s. 191 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and the master acquired the same remedies for wages as seamen as well as a limited right in respect of his disbursements; but the section occurs in Part III. of the Act, and, by s. 109, the provisions of that part of the Act apply only to British ships or ships registered in a British possession. It is true that it was held in *The Milford* (2) that a foreign master was entitled to the same remedy against ship and freight as a British master; but Dr. Lushington only evaded the terms of s. 109 by saying that "the language there used is affirmative, stating the cases to which the third part of the Act shall extend; there are no negative words which tend to shew that the Court should not apply s. 191 to foreign masters and seamen." That reasoning, it is submitted, is unsound, and that case is no authority for the proposition that a foreign master has a maritime lien conferred by statute, though it may be supported in respect of giving him the right to sue in rem.

It was thought that, under s. 10 of the Admiralty Court Act, 1861 (24 Vict. c. 10), a master acquired a maritime lien both for his wages and disbursements: *The Mary Ann* (3); but this case was overruled by the House of Lords in *The Sara* (4) in respect of his disbursements, and, though an Act was immediately passed (5), giving a master this right, the section

(1) (1872) 1 Asp. M. L. C. 481.
(2) Sw. 362, at p. 367.
(3) (1865) L. R. 1 A. & E. 8.
(4) (1889) 14 App. Cas. 209.
(5) The Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), s. 1.

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does not refer to a foreign master. The terms of this section of the Act of 1889 and of s. 191 of the Merchant Shipping Act, 1854, are now embodied in s. 167 of the consolidating statute of 1894. (1) The section occurs in Part II. of the Act, and by s. 260 (reproducing s. 109 of the Act of 1854) the application of Part II. is restricted to ships registered in the United Kingdom, or by s. 261 to Colonial ships. By s. 265 (reproducing s. 290 of the Act of 1854), in the case of a conflict of laws, and no provision in Part II. of the Act applicable, then the law of the port to which the ship belongs is to govern the case, whilst where the Act is to apply to foreign ships (after certain formalities have been complied with) the Legislature is careful to say so, as in ss. 219, 238. This is pointed out in *Poll* v. *Dambe* (2), where it was held that the words "his ship" in s. 236, sub-s. 1, applied only to British ships.

*Aspinall, K.C.*, in reply. If the lex loci applies, it must be admitted that there would be no priority in respect of the wages of the master beyond the last voyage; but it has been repeatedly held that the lex fori applies, and, from December 1, 1901, when the plaintiff became master, to October 21, 1902, the date of the writ, the plaintiff, though the foreign master of a foreign ship, is entitled to his wages and disbursements on the basis of having a maritime lien: *The Milford* (3), confirmed by *The Jonathan Goodhue* (4), and relied on by Channell J. in *Reg.* v. *Stewart* (5), where the words "any ship" in s. 111 of the Merchant Shipping Act, 1894, were held to include a foreign ship in an English port, and Darling J. in his judgment explains the effect of ss. 260, 261 of the Act by quoting from *Hart* v. *Alexander* (6) that "some of" (the provisions of the second part of the Act) "are expressly applicable only to British ships, and some are made applicable also to foreign ships; but there is a third class of provisions which are quite irrespective of the nationality of the ships or seamen"; in other words, each section must be looked at separately to ascertain its scope, as what is included does not necessarily exclude: *The*

(1) 57 & 58 Vict. c. 60.
(2) [1901] 2 K. B. 579.
(3) Sw. 362.
(4) (1859) Sw. 524.
(5) [1899] 1 Q. B. 964.
(6) (1898) 36 S. L. R. 64.

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*Mac.* (1) See also the remarks of Vaughan Williams L.J. in *The Brunel* (2) on the word "tonnage," as used in different sections of the Act of 1894.

[Reference was also made to the following cases: *Howard Smith* v. *Wilson* (3); *The Crystal* (4); *The Gustaf* (5); *The Immacolata Concezione* (6); *Davidsson* v. *Hill* (7); *The Ruby, No.* 2 (8); *The Raffaelluccia.* (9)]

PHILLIMORE J. In this case the seamen have proved their case for wages, as I understand by admissions with regard to figures, subject to the necessary reductions bringing the claim to October 21, instead of some day in November, and they shall have judgment for those wages and such subsistence money from that date forward and viaticum as the parties shall agree or the registrar shall decide. For the purpose of determining whether any viaticum shall be paid, the registrar will be guided by the ruling in the case of *The Immacolata Concezione.* (6) I should add that the seamen are to have judgment for payment out of the proceeds in court of their wages, and they will have an order when the other sums have been collected for payment out of those other sums in priority to payment out to anybody else who has appeared on behalf of the ship, or who has any interest in the ship, including the mortgagee.

With regard to the master the position is a peculiar one. He is the brother of the owner, and he has a very long claim for wages running over a long period, and for disbursements. It is obvious that anybody who comes in competition with him has a right to have that claim examined, and any judgment in his favour must be subject to some examination either between the parties themselves or before the registrar. It appears that he was put on board by his brother in December, 1900. He had considerable practical experience as a seaman, but he had no certificate, and therefore could not be passed as a master. If we take his evidence, which is uncontradicted, and, as far

(1) (1882) 7 P. D. 126.
(2) [1900] P. 24, at p. 35.
(3) [1896] A. C. 579.
(4) [1894] A. C. 508.
(5) (1862) Lush. 506.
(6) (1883) 9 P. D. 37.
(7) [1901] 2 K. B. 606.
(8) [1898] P. 59.
(9) (1877) 3 Asp. M. L. C. 505.

as I know, is not at variance with the books which he has produced (as to that the registrar will inquire), he received from that date forward the master's wages, the master being disrated and taking wages as the mate. In September, 1901, he became a certified master; and in November, 1901, the old master left the ship. In my opinion, and I so decide, he was not master before September, and he became master from September; the date must be ascertained, if necessary, by the registrar—being the date when he can prove that he obtained his certificate. If he cannot prove the certificate, then he must go till November, when the other master left the ship; but, in my opinion, from the moment he got the certificate, or the right to obtain it, from that moment he was master. His claim for wages must depend upon whether he was master or whether he was in his earlier position, which was analogous to that of a supercargo. I have no doubt it was a position which would give him a claim in the Admiralty Court as a seaman for wages.

It is necessary to determine with regard to the master whether he comes in priority to the mortgagee, whose mortgage was registered on June 19, 1901. Now it is clear that under 24 Vict. c. 10, s. 10, he has a right in rem and a right to sue for his wages and disbursements, though, as the case of *The Sara* (1) has pointed out, that does not necessarily shew that that right comes in priority to the mortgagee.

I have first to determine whether the lex fori or the lex loci applies; and I am of opinion that the lex fori applies, because we are construing an English statute with regard to property which is within the English jurisdiction, as was decided in *The Milford*. (2) Both upon principle and authority I so hold. There may be a question whether with respect to part of this case the lex fori does not import the lex loci. I will touch upon that later on.

Now, applying for the moment the lex fori, the man was a seaman up to the date when he became master—probably, as I have said, in September, 1901. I see no reason why by the lex fori he should not have his wages for that period. With regard

(1) 14 App. Cas. 209. (2) Sw. 362.

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to the wages subsequent to that time, I am bound unquestionably by *The Milford* (1) to hold that he has a maritime lien, as good a maritime lien as the master of an English ship, for his wages up to the date of the issue of the writ.

I think it would be unfortunate if it should be necessary to hold that the law laid down in *The Milford* (1) must be overruled, and I think it is extremely difficult to upset that decision, even supposing at the time it was decided it was a wrong construction of the Act of 1854. I think, moreover, that there are considerable authorities for saying that *The Milford* (1) was rightly decided. At the same time, if the matter were absolutely res integra, it might be difficult to arrive at the conclusion which was arrived at in that case; but *The Milford* (1) has been expressly approved by my brothers Darling and Channell in the case of *Reg.* v. *Stewart* (2), and has been followed over and over again in this Division. The ground upon which it can be supported is that the words of the statute are affirmative and general, giving a master of an English or foreign ship the same lien for his wages as a seaman had. The further ground for, if possible, adopting that construction is the ground which will be found expressed in the judgment of the Lord Chief Justice, my brother Lawrance, and myself in the case of *Poll* v. *Dambe* (3), namely, that the provision of the Merchant Shipping Act, 1854, was in substance the removal of a very artificial and archaic rule of the common law of this country, and the bringing of the common law of this country in matters maritime, as it is most desirable it should be brought, into harmony with the laws of almost every other country, except, probably, in some period of their history—whether now or not, I do not know—of the United States of America. Those are the grounds for adopting the construction of the principle laid down in *The Milford.* (1) On the other hand, it is extremely difficult to satisfy the clause as to the application of this part of the Merchant Shipping Act. The strongest reasoning is that of my brother Channell in *Reg.* v. *Stewart* (2), which will commend itself, I have no

(1) Sw. 362. (2) [1899] 1 Q. B. 964.
(3) [1901] 2 K. B. 579.

doubt, to any Court which examines into this matter. In the case of *Poll* v. *Dambe* (1) we pointed out that the case of *Reg.* v. *Stewart* (2) can be perfectly well supported upon other grounds, and we did not profess or desire to make any comment upon that decision. Assuming that *The Milford* (3) was rightly decided, there is nothing more to be said; but assuming it to be wrongly decided, it is very difficult to say that Parliament has not by the great mass of subsequent legislation accepted and given a statutory force to the construction which *The Milford* (3) put upon the Act of 1854. The Act procured by the late Sir Charles Hall, 52 & 53 Vict. c. 46, was passed avowedly to remedy the decision in *The Sara* (4), that the master, no doubt, of an English ship, had no lien for his disbursements, though he had for his wages; and it extended the maritime rights of the master to his disbursements, in addition to his wages. The Act is perfectly general. It is true, as has been observed by counsel for the mortgagee, that it only gives a master a lien for disbursements where he had a lien for his wages, and that if a foreign master has no lien for wages he has no lien for disbursements given him by the Act; but, having regard to the case of *The Milford* (3), and to the principles upon which Courts of justice act, and subsequent legislation, it does seem extraordinary that, if the Act was not intended to extend to foreign masters, perfectly wide and general words should be used. I have great difficulty in saying that the Act 52 & 53 Vict. c. 46 does not positively give a remedy for the disbursements and, by implication, a remedy for the wages of a foreign master.

No doubt the position is somewhat altered by the last Consolidation Act of 1894, which incorporates Sir Charles Hall's Act in its second part; but the net result obtained is that there is an old, well-known, and constantly followed decision, with at least two opportunities, which the legislature has not used, when the legislature could have made it clear that the decision was wrong. Those are the grounds upon which I think that *The Milford* (3) would be supported; and, as I say

(1) [1901] 2 K. B. 579.
(2) [1899] 1 Q. B. 964.
(3) Sw. 362.
(4) 14 App. Cas. 209.

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again, I think it would be a very grave matter if the law of England, which was supposed for forty years to be in harmony with the law of the rest of the world on this point, and which is certainly not an unreasonable law, should be now discovered to be, and to have been, out of harmony with the rest of the world.

There is a possible view suggested by my brother Channell in *Reg.* v. *Stewart* (1) that the section about conflict of laws operates wherever it is proved that there is a foreign ship with a different law. If that were the proper view of these sections, then the master would have his remedy here where the Argentine law gave it, but would not have the remedy where the Argentine law did not give it. In other words, he would be entitled to his wages for the last voyage, and he would be entitled to his disbursements for the last voyage; for by the Argentine law there is no maritime lien, nor anything corresponding with a maritime lien, for wages of the master or crew for a previous voyage or for disbursements expended on a previous voyage; but there is a lien for wages during the voyage, which means from the time the vessel left her home port till she returns, and for disbursements during the voyage if certain conditions with regard to disbursements are complied with; and it seems to me in this case that they were complied with.

There remains a question about the disbursements before he became master. In my opinion, if those disbursements are of the ordinary kind—port dues, coal bills, and so forth—he cannot claim them, and I so direct. I follow and concur in the decision in *The Albion* (2), so that if the whole disbursements are, as apparently they are, payment of wages of the crew, who might have seized the ship, then I think that the doctrine, that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant, should be applied, and he has a lien for any disbursements made, although he was not master, in payment of the wages of the crew, probably that means for all disbursements which are here at stake.

(1) [1899] 1 Q. B. 964. (2) 1 Asp. M. L. C. 481.

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The result is that the master is to have judgment for such sum as he shall prove to be his wages whilst he was supercargo; secondly, for such sum as he shall prove to be his wages while master; thirdly, for his disbursements while master; fourthly, for any sums which he dispensed for the ship while he was supercargo in payment of the crew's wages—all subject to investigation by the registrar, and to the set-off of freights and other sums received on behalf of the ship—and his costs.

Solicitors for plaintiffs, the master and crew of the *Tagus*: *Thorneycroft & Willis, for Taynton, Sons & Siveter, Gloucester.*

Solicitors for mortgagees intervening: *Witty, Wainwright & Pollock.*

T. L. M.

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## THE ALMA.

1903

*Jan.* 13.

*Admiralty—Practice—Limitation of Liability—Life Claims—Property Claims—Time for Entry—Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 3—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 504—*Payment out of Unappropriated Balance.*

In an action for limitation of liability the usual advertisements were issued, intimating to all persons having any claim in respect of loss of life or damage to property that, if they did not come in and enter their claims within three months from the date of the decree, they would be excluded from sharing in the amount of 15*l.* per ton standing in court to the credit of the action.

The claims entered in respect of loss of property more than exhausted the statutory liability of 8*l.* per ton; but only six out of a possible eleven claims in respect of loss of life were entered within the limit of time, and these absorbed only a small portion of the statutory liability of 7*l.* per ton:—

*Held*, by Sir F. H. Jeune P., that, the Court having exercised the power given by s. 504 of the Merchant Shipping Act, 1894, of fixing the time within which claimants should come in, the unappropriated balance of the fund must be paid back to the plaintiffs in the limitation suit, notwithstanding that all the possible life claims had not been entered, and that the year had not elapsed within which, under s. 3 of Lord Campbell's Act, an action in respect of such a claim could be commenced.

MOTION by plaintiffs in a limitation suit to confirm the registrar's report in part.

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The case turned on the construction to be put on the words in s. 504 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60): The High Court "may proceed in such manner and subject to such regulations as to . . . . the exclusion of any claimants who do not come in within a certain time . . . . as the Court thinks just."

The facts were shortly as follows:—

On April 1, 1902, a collision occurred in the English Channel between the steamship *Alma*, belonging to the London and South Western Railway Company, and proceeding from Southampton to Havre with passengers and a general cargo, and the sailing vessel *Cambrian Princess*, with guano from Lobos de Afuera to Antwerp. In consequence of the collision the *Cambrian Princess* sank, and eleven of her crew, including two apprentices, were drowned.

On April 2 the owners of the *Cambrian Princess* instituted an action in the Liverpool District Registry against the owners of the *Alma* to recover the damage sustained by the loss of their vessel. To this action the London and South Western Railway Company appeared as defendants and admitted their liability.

On April 24 the London and South Western Railway Company, as owners of the *Alma*, commenced the present action of limitation of liability against the owners of the *Cambrian Princess*, and all and every person whomsoever claiming or being entitled to claim in respect of the loss of the said ship, or in respect of damage or loss to goods or merchandise on board the said ship, and the survivors of the persons on board the said ship and the legal personal representatives of the persons who lost their lives by reason of the loss of the said ship, and all and every person or persons claiming or entitled to claim in respect of any loss of life or personal injury occasioned by the loss of the said ship.

On June 23 Gorell Barnes J. pronounced that the plaintiffs were entitled to limited liability according to the provisions of the Merchant Shipping Act, 1894, and that in respect of loss of life or personal injury, or of loss or damage to ships, goods, merchandise, or other things caused by reason of the

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improper navigation of the *Alma* on the occasion of the collision between that vessel and the *Cambrian Princess*, the owners of the *Alma* were answerable in damages to an amount not exceeding 16,587*l.* 9*s.*, such sum being at the rate of 15*l.* for each ton of the registered tonnage of the *Alma* without deduction on account of engine room, and that in respect of claims for damage to ship, goods, or merchandise or other things alone, the owners of the *Alma* were answerable in damages to an amount not exceeding 8840*l.* 12*s.* 9*d.* of the said sum of 16,587*l.* 9*s.*, being at the rate of 8*l.* for each ton of the registered tonnage of the *Alma*. The judge also directed that upon payment into court of the said sum of 16,587*l.* 9*s.*, together with interest thereon at 4 per cent. from the date of the collision until payment into court, and upon payment of the costs of the plaintiffs in the action commenced in the Liverpool District Registry, all proceedings in that action should be stayed. The judge further ordered that three advertisements should be inserted at intervals of not less than a week in *The Times*, the *Shipping and Mercantile Gazette*, and a Liverpool newspaper of good circulation, " intimating to all persons having any claim in respect of loss of life or personal injury or damage caused as aforesaid that, if they do not come in and enter their claims on or before September 23, 1902, they will be excluded from sharing in the aforesaid amount; the last of such advertisements to be inserted on or before September 9"; and the judge referred all claims brought in, or hereafter to be brought in, in this action to the registrar, assisted by merchants, to assess the amount thereof. The judge also condemned the plaintiffs in the costs of the action.

On July 4 the plaintiffs, the owners of the *Alma*, paid into court 16,758*l.* 6*s.* 5*d.*, being the amount of their statutory liability inclusive of interest, and this sum was invested in Consols pending the adjustment of claims.

On December 15 the registrar made his report assessing the property claims, namely, ship, cargo, freight, and personal effects, at 13,212*l.* 14*s.* 8*d.*, and, with reference to claims in respect of loss of life and personal injuries, he stated that four cases had been tried in the King's Bench Division with juries,

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and sums of 120*l.*, 100*l.*, 100*l.*, and 60*l.* awarded in respect of the death of four persons; whilst 300*l.* had been paid by the railway company to a passenger on board the *Alma* in settlement of a claim filed for compensation for personal injuries. The report further stated that two claims had been filed in the registry in respect of the death of the two apprentices, and 20*l.* allowed in one case, whilst the other claim had been disallowed, making a total of 400*l.* in respect of the claims for compensation for loss of life. The report proceeded: "Only six claims for loss of life have been put forward—that is, four in the King's Bench Division and two in the Admiralty Court. In the same six cases and in one other case there are claims for lost effects, so that there are four cases in which no claim has been made for loss of personal effects and five cases in which there is no claim for loss of life. Any further claims for loss of property are clearly out of time, and the distribution of so much of the fund (8*l.* per ton) as is applicable to such claims ought not, I think, to be delayed with the chance of any further claims coming in; but claimants for loss of life have under Lord Campbell's Act a year and a day for bringing actions, and, although there is no reason for deferring payment of the loss of life claims already brought, the fund available for such claims (7*l.* per ton) being far more than sufficient to pay in full any possible claims upon it, a small portion of the balance remaining after payment of the present claims ought, I think, to be retained in court until the expiration of the year and day allowed by Lord Campbell's Act for bringing such claims."

*R. B. Acland*, for the plaintiffs, the London and South Western Railway Company. The time limited for the entry of claims expired on September 23, and the registrar has made his report on those claims, so that distribution can now take place; but, by his report, the registrar suggests the retention in court for a year and a day of "a small portion of the balance remaining after payment of the present claims" to meet any further life claims.

It is, however, submitted that the provisions of s. 504 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), with

reference " to the exclusion of any claimants who do not come in within a certain time," apply as much to claims in respect of loss of life as to claims in respect of damage to property, and, therefore, as the Court directed that the usual notice of the proceedings should be given by advertisement to all persons interested, and no other claim having been made prior to the time which has now arrived for the distribution of the fund, any further claims, whether in respect of life or property, are equally barred, although the period mentioned in s. 3 of Lord Campbell's Act (9 & 10 Vict. c. 93) of twelve months from the death in respect of life claims has not elapsed, nor the period of six years which is allowed under the Statutes of Limitation in respect of property. It would also greatly embarrass the Court to decide what proportion of the balance should be retained, and the Court is now asked to order the sale of the Consols, the distribution of the fund amongst the parties entitled thereto, and the return of the balance to the plaintiffs.

*Holloway*, for the relatives of two of the deceased seamen, and

*Alexander D. Bateson*, for the owners, master, and certain of the crew of the *Cambrian Princess*, supported the motion.

THE PRESIDENT (SIR F. H. JEUNE). At first my feeling was against the motion made by counsel on behalf of the plaintiffs, because I thought it possible, though not probable, that there might be further claimants in the King's Bench Division, and that no great harm would be done in keeping back a certain amount to meet their claims. But, on further consideration, I do not think that is the true view to take, for the words of s. 504 are to my mind clear, and do give this Court power to do that which it has done, namely, to fix a time within which claims must come in.

It seems to me on principle important that this Court should fix a time to prevent claims from going on for an unlimited period. It would be contravening the object of the statute to hold that, in limitation actions, claims for loss of or damage to goods should be allowed to be brought in at any time within six years, the period allowed by the Statutes of Limitation,

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The President.

and it seems to me important that where there is a fund to be distributed persons should come forward and make their claims within the time fixed. I am impressed by the argument that claims for loss of life and claims for loss of goods cannot be dealt with separately. On the whole I am prepared to accede to the view that as the effect of s. 504 is to give the Court power to fix a time after which persons shall be excluded, it is only a logical consequence that, after that period has expired, you must treat possible further claims as non-existent, and it would, therefore, be inconsistent to reserve a portion of the fund. I might perhaps arrive at a reasonable figure, but it would be highly uncertain, and in many cases it might be a mere guess to determine the amount which should be reserved for such hypothetical claims. I am, therefore, of opinion that this part of the report ought not to be confirmed. As regards the rest of the report I understand there is no objection, and it will be confirmed.

The result is that the Consols will be sold, the London and South Western Railway Company will have paid out to them the balance of the 7*l.* per ton, after paying the loss of life and personal injury claims as found by the registrar in his report. The rest of the fund (made up of the 8*l.* per ton) will be paid out to the parties found to be entitled thereto in respect of the property claims. The parties appearing on the motion will be allowed in addition their costs against the plaintiffs.

Solicitors for plaintiffs: *Clarkson, Greenwell & Co.*

Solicitors for the owners of the *Cambrian Princess* and others: *Charles Russell & Co.*

Solicitors for relatives of two of the deceased seamen: *G. & W. Webb.*

T. L. M.

## In the Goods of BALDWIN.

1902
Dec. 17.

*Administration, with Will annexed — Specific Legatee — Limited Grant — Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

The Court, without requiring citation of next of kin, made a limited grant of administration, with will annexed, under s. 73, to the sole beneficiary named in the will.

*In the Goods of Jenny Watson*, (1858) 1 Sw. & Tr. 110, followed. (1)

Motion for administration, with will annexed.

Anna Ellison Platt Baldwin, late of Bahama Cottage, Oaksey, in the county of Wilts, died on April 30, 1901, a spinster and without parent, leaving as her next of kin two brothers and two sisters, all resident in Massachusetts.

The deceased was an orphan and lived with her aunt, Anna Ellison Platt, by whom she had been brought up.

In February, 1901, she made a will in her aunt's favour. The shares mentioned therein had formerly been the property of the said Anna Ellison Platt, but were transferred by her into the name of the deceased in the expectation that the deceased would survive her.

The will, which appointed no executor, was in the following terms:—

"This is the last will and testament of me, Anna Ellison Platt Baldwin, of Bahama Cottage, Oaksey, in the county of Wilts, England, made this 13th day of February, 1901. I hereby revoke all wills made by me heretofore.

"I return to my aunt, Anna Ellison Platt, my eight shares in the Capital and Counties Bank, . . . . twenty shares in the Cirencester Sanitary Laundry Company, Limited.

"A. E. P. Baldwin.

"Witnessed by

"Wm. Henry Mays.

"Mary Jane Mays."

Repeated applications had been made by the solicitors of the said Anna Ellison Platt to induce the brothers and sisters, or

(1) But see *In the Goods of Watts*, (1860) 1 Sw. & Tr. 538.

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BALDWIN, IN THE GOODS OF.

one of them, to execute a power of attorney in favour of the said Anna Ellison Platt, so that a grant of the estate could be taken by her; but this they persistently neglected to do, and in one of the letters received from a brother of the deceased he intimated that he would not do anything by which, after his aunt's support had been provided for, any property she might leave would go to any one, other than himself and his brothers and sisters.

The said Anna Ellison Platt had no property whatever other than a small Government pension of 30*l.* a year, and greatly needed the shares for her maintenance and support.

*Rayner Goddard*, for the aunt, moved the Court, and relied upon *In the Goods of Watson.* (1)

GORELL BARNES J. It seems to me this is a case in which I may allow the aunt to take administration, with the will annexed, under s. 73 of the Probate Act, 1857, the grant to be limited to the property specifically given to her by the will. As there is no formal attestation clause, the registrar must have evidence of the due execution of the will before he allows the grant to issue.

Solicitors: *Peacock & Goddard, for Sewell & Sons, Cirencester.*

H. D. G.

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1903
*Jan.* 19.

## IN THE GOODS OF WILLIAM JOHN CORY.

*Administration—Special Circumstances—Sureties dispensed with.*

While the Court has no power to give leave to a proposed administratrix to carry on the deceased's business, it may, under special circumstances and for good cause shewn, allow her a free hand in the administration, by dispensing with sureties to the administration bond, and by accepting the personal bond of the proposed administratrix for the administration of the estate according to law.

THIS was a motion by Jemima Cory, asking that, upon her taking, as the lawful widow and relict of William John Cory,

(1) 1 Sw. & Tr. 110. But see *In the Goods of Watts*, (1860) 1 Sw. & Tr. 538.

deceased, letters of administration of his personal estate and effects, she might have leave to continue and carry on his business of a constructing engineer, for the support and benefit of herself and his three natural and lawful children. The applicant further asked that sureties to the administration bond might be dispensed with, or, alternatively, that the usual penalty in respect of the said bond might be reduced.

William John Cory, the deceased, died intestate on December 7, 1902, leaving Jemima Cory, his lawful widow, and three children him surviving.

The children were two girls, aged respectively twenty and fifteen, and a boy aged thirteen.

For some years before his death the deceased carried on a small business of a structural engineer upon premises in Battersea, which he rented from the Great Western Railway Company, subject to six weeks' notice to terminate the tenancy. On account of the personal nature of the business and the short tenancy upon which the business premises were held, no goodwill attached thereto.

The total estate of the deceased amounted in net value to the sum of 870*l.* 8*s.* 1*d.* and no more, and was made up of the following items:—

| | £ | *s.* | *d.* |
|---|---|---|---|
| Stock-in-trade and machinery, valued at . . | 536 | 2 | 10 |
| Book debts owing to the deceased . . . . | 358 | 2 | 5 |
| Household furniture (estimated value) . . | 100 | 0 | 0 |
| Cash at bank and in the house . . . . . | 12 | 19 | 6 |
| Life insurance policy . . . . . | 14 | 0 | 0 |
| Gross . | £1021 | 4 | 9 |
| *Less*: Debts owing . . . . . | 150 | 16 | 8 |
| Net . | £870 | 8 | 1 |

The deceased kept no proper books, but from information conveyed by him to his wife from time to time, and from the wife's knowledge of the housekeeping expenditure, she was able to say that the business produced a net profit of about 2*l.* 10*s.* per week.

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She had no means of her own, nor were there any funds available for the support of herself and her three children other than the estate of the deceased.

She was advised and believed that, having regard to the short tenancy upon which the business premises were held by the deceased and the personal nature of the business, any purchaser of the stock-in-trade and machinery would, in all probability, purchase the same with a view to removing to other premises, and the same would probably not realize more than 200*l.* If, therefore, all the book debts proved good, and if the furniture realized its estimated value, the total net estate would not exceed 534*l.* 5*s.* 3*d.*

The eldest child swore an affidavit, concurring in the application and corroborating the statements of her mother.

The application was also supported by the affidavit of a business friend of the deceased and of a man who was recommended by him as manager. They concurred in the belief that the business could be carried on by the widow at a net profit of 30*s.* per week.

*Durley Grazebrook*, for the applicant. Although there is no precedent for this application, the Court has sufficient power to grant it, and, in such a meritorious case, a precedent should be created. Under s. 4 of the Probate Act, 1857 (20 & 21 Vict. c. 77), the Court can give leave to carry on the business. The words of the section should not be construed in a restricted sense.

[THE PRESIDENT. The powers of the Court do not extend to giving directions as to how the estate is to be administered.]

The administratrix would not be administering the estate "according to law" if she were to carry on the business without leave of the Court, and she would probably find it impossible to get any persons to be sureties under those circumstances. If, however, the Court is clearly of opinion that there is no power to give the required leave, would it dispense with sureties, and thus leave the widow a free hand? There would be some security for the children in the widow's undivided third share, which would, of course, remain in the

business. The Court is not bound to require bondsmen. It has full discretion under s. 81 of the Probate Act, 1857, which deals with administration bonds.

JEUNE P. I am inclined to think in this special case I may grant administration in the ordinary way, taking the applicant's own bond and not requiring sureties.

I cannot strain the power of the Court so far as to say I have any jurisdiction to direct or control or suggest anything with regard to the administration of this property, beyond granting administration in due course of law. I have no power to direct or give leave to the widow to carry on the business as administratrix in a particular way. But, under the circumstances, I am persuaded that it is very desirable that she should have a free hand with regard to the management of this property, and I am willing to promote that object by saying, in this special case and under these special circumstances, that I will not require sureties, and that her own bond alone may be accepted upon her taking letters of administration.

Solicitors: *Edwin Smith & Ellis.*

H. D. G.

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*Feb.* 13.

[IN THE CONSISTORY COURT OF RIPON.]

## PEARSON *v.* STEAD AND ALL PERSONS HAVING INTEREST. STEAD *v.* PEARSON.

*Faculty—Inscription on Tombstone in Parish Churchyard—Prayers for the Dead—Removal from Tombstone of Inscription apparently placed there as an Invitation for Prayers for the Relief of the Souls of deceased Persons named thereon from pains of Purgatory—Vestry—Control of Incumbent over Inscriptions on Tombstones—Presumption—Discretion of Ordinary—Court Fees.*

The incumbent of a parish church objected to the retention on a newly erected tombstone in the parish churchyard of an inscription which had been placed there without his consent or the sanction of a faculty, and the material portion of which consisted of the following words: "Of your charity pray for the repose of the souls of the beloved son, of . . . . and . . . ., died . . . . also of . . . ., son of the above . . . ., died . . . . On whose souls sweet Jesus have mercy"; and subsequently applied to the Ordinary for a faculty for the removal of the tombstone out of the churchyard. The parishioner who had caused the tombstone to be erected appeared as respondent in the suit, and, further, himself instituted a suit praying for a confirmatory faculty confirming the erection of the tombstone and its retention in the churchyard with the above inscription on it. The two suits were heard together, and at the hearing it appeared that the deceased persons named on the tombstone were members of a Roman Catholic family, and that the inscription had been composed as being the usual inscription placed on tombstones erected to the memory of Roman Catholics:—

*Held*, that the onus of satisfying the Court that the inscription was in all respects unobjectionable lay upon the petitioner for the confirmatory faculty, and had not been discharged; that the evidence supported the presumption that the inscription was intended to be an appropriate one in memory of Roman Catholics, and in regard to prayers for the dead in conformity with the doctrine of purgatory as recognised and enjoined by the Roman Catholic Church, and that the Court, whilst declining on these grounds and the further ground that the churchwardens and those parishioners who were members of the Church of England entertained conscientious objections to the retention of the inscription, to decree a confirmatory faculty, must decree a faculty to issue to the incumbent authorizing him to remove the tombstone from the church.

Inscriptions proposed to be placed on the tombstones in a parish churchyard are in the first instance subject to the control of the incumbent of the parish, but any decision come to by him may be reviewed by the

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Ordinary on proper application being made to the Ecclesiastical Court of the diocese.

The solicitors in ecclesiastical suits are as officers of the Court personally responsible for and bound to pay into the registry the Court fees incurred by them on behalf of their respective clients; but the solicitor having so paid the fees is entitled, if his client is successful in the suit, to obtain an order on the unsuccessful party to recoup him for the payments made by him.

THERE were two causes of faculty instituted, one on behalf of the Rev. William Pearson, clerk, rector of the rectory and parish church of Spofforth, in the county of York and diocese of Ripon, against Lawrence Stead, then of Castle Street, in the parish of Spofforth aforesaid, a corporal in His Majesty's Royal Engineers, and all other persons having interest, for the purpose of obtaining a faculty authorizing and empowering the petitioner to take up and remove out of the churchyard of the same parish a tombstone caused to be erected over a grave there by the respondent on August 17 last, bearing the following inscription: "Of your charity pray for the repose of the souls of Walter Austen, the beloved son of George and Ann Stead, of Spofforth, died January 13th, 1894, aged 24 years; also of George Edwin, son of the above, died August 11th, 1869, aged 8 years. On whose souls sweet Jesus have mercy"; and the other, brought on behalf of Lawrance Stead against the Rev. William Pearson, praying the Court to decree a faculty confirming the erection of the tombstone above referred to, and authorizing the retention thereof.

The petition in the first suit, that in which the rector of Spofforth was the petitioner, alleged that the inscription on the tombstone was not submitted to the petitioner for his approval previous to being placed on the tombstone, the erection of which was without his permission; that the petitioner had formally protested against the erection of the tombstone without his permission, and had requested its removal, and that the respondent Lawrence Stead had refused to remove it.

The petition in the second suit repeated the above allegations of fact with respect to the tombstone having been caused to be erected by Lawrence Stead on August 17 last, and as to the

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wording of the inscription placed thereon; and further alleged that the Rev. William Pearson, the rector of Spofforth aforesaid, by letter dated August 24 last, wrote to Lawrence Stead stating that he had been directed by the authorities to require him to remove the tombstone, and to submit to him another form of inscription which would be unobjectionable, but that the request in this letter to remove the tombstone had been refused. (1)

1901. Nov. 28. The two suits came on to be heard together, on the same evidence, before the Chancellor of the Diocese of Ripon (Dr. Tristram, K.C.) (2)

The rector and one of the churchwardens of Spofforth gave evidence in support of the petition in the first suit. The result of their evidence and of the evidence of witnesses examined on behalf of the petitioner in the second suit is stated in the judgment.

The rector of Spofforth appeared in person.

*Soper* appeared for Lawrence Stead.

[The following authorities were cited on behalf of the vicar of Spofforth: The Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 51; Harding's Ecclesiastical Law, p. 53; Art. XXII. of The Thirty-nine Articles of Religion; Handbook to Romish Controversy, pp. 80, 81. On behalf of Lawrence Stead: *Maidman* v. *Malpas* (3); *Breeks* v. *Woolfrey* (4); *Keet* v. *Smith* (5); *Egerton* v. *All of Odd Rode*. (6)]

*Cur. adv. vult.*

1902. Feb. 13. DR. TRISTRAM. In this case the Rev. William Pearson, rector of the parish of Spofforth in this

(1) Separate citations were issued in each suit. The citation in the first suit was served personally on the respondent Lawrence Stead on September 20, 1901, and affixed on the outer door of the parish church of Spofforth on the Sunday immediately following. The citation in the second suit was served by being served personally on the rector. No further pleadings other than the petitions were entered into in either suit.

(2) The Court sat at Leeds.

(3) (1794) 1 Hagg. Cons. 205.

(4) (1838) 1 Curt. 880.

(5) (1875) L. R. 4 A. & E. 398; 1 P. D. 73.

(6) [1894] P. 15.

diocese, on September 24, 1901, filed a petition in the Court alleging that on August 17, 1901, Lawrence Stead, a corporal in the Royal Engineers, had caused a tombstone to be erected over a grave in the churchyard of his parish bearing the following inscription: "Of your charity pray for the repose of the souls of Walter Austin, the beloved son of George and Anne Stead, of Spofforth, died January 13th, 1894, aged 24 years; also of George Edwin, son of the above, died August 11th, 1869, aged 8 years. On whose souls sweet Jesus have mercy"; and that the tombstone was erected without his permission, and without the inscription having been submitted to him for his approval. That when the fact of its erection came to his knowledge, he protested to the said Lawrence Stead against its erection without his permission, and requested him to remove the same, which he refused to do; and he therefore prayed the Court to decree a faculty authorizing him to remove the tombstone from the churchyard.

On October 16, 1901, Lawrence Stead appeared by his solicitor in this suit in opposition to the granting of this faculty.

On October 23, 1901, Lawrence Stead filed a petition in the Court, alleging that he had caused a tombstone to be erected in the Spofforth churchyard with the above inscription; that the rector had by letter required him to remove it, and to submit to him another form of inscription which would be unobjectionable, which he had refused to do, and that in consequence of such refusal the rector had applied to the Court for a faculty authorizing him to remove the said tombstone; and he therefore prayed the Court to decree to him a faculty confirming its erection, and authorizing its retention in the churchyard.

At the hearing of the case the petitioner, with the leave of the Court, entered an appearance in Stead's suit in opposition to a confirmatory faculty being granted to him.

The case was heard on November 28, 1901, when the rector conducted his own case in person, and Mr. Soper appeared as counsel for Lawrence Stead.

The material facts proved at the hearing are as follows: Spofforth is an ancient parish with an old church and church-

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yard belonging to it. In 1889 the churchyard was enlarged by the addition of a portion of the rectorial glebe, which was consecrated. The cost of making the addition was defrayed by subscription. It is in this portion of the churchyard that this tombstone is erected. The cost of keeping up the churchyard is defrayed by the churchwardens out of the offertories collected in the church.

The first information the rector had that this tombstone had been placed in the churchyard was given him by the sexton shortly after its erection. He thereupon proceeded to the churchyard, and, on seeing Stead there, he protested to him against his erecting it without his permission, adding that the character of the inscription excluded the possibility of his accepting it. Stead said the church and churchyard belonged to the people of his faith, and that he insisted on its remaining there. The rector next conferred with the churchwardens and sidesmen, informing them that he proposed to petition for a faculty to obtain its removal. They approved of his taking this course, and the Bishop of Ripon concurred in what he had done and proposed to do. But before commencing proceedings the rector applied by letter to Stead to remove the tombstone, and offered to sanction its retention if he would substitute for the inscription the letters R.I.P. Having received no answer to this offer, he filed his petition.

In accordance with directions given by me that the opinion of the parish vestry should be taken on these applications prior to the hearing, a vestry was held at 9 A.M. on the morning of the hearing, attended by twenty-three parishioners, at which Mr. Pennington, the people's churchwarden, moved, and Mr. Linfoot, the rector's sidesman (the rector's churchwarden being absent through illness), seconded, the following resolution: "That inasmuch as the Stead tombstone has been erected without the sanction of the rector, and without any application having been made to him for such sanction, this vestry entirely disapproves of such tombstone and of the inscription placed thereon; and this vestry further desires to express its emphatic agreement of the steps taken by the rector to secure the removal of the tombstone, and trusts

that his application to the Chancellor of the diocese may be successful."

To this resolution the following amendment was proposed by Mr. Gallemal and seconded by Captain George Manley: "That in the interest of peace and goodwill in the parish of Spofforth this tombstone be allowed to remain as it is."

There were eleven votes for the amendment and twelve against it. The original resolution was then carried by twelve against eleven. Nine out of the eleven who voted for the amendment were Roman Catholics, and the twelve who voted for the resolution were members of the Church of England.

It appeared also in evidence that the population of the parish was 1696, and was almost entirely a working-class population covering eight miles by seven, and that the average attendance at the vestry meetings was eight or nine in number, and that there were many Roman Catholics, including gentlemen of property resident in the parish, that the Roman Catholics did not attend or subscribe towards the church, that there was a Roman Catholic chapel just outside the parish about two miles from the parish church which the Stead family attended, and that there was attached to it a burial ground half an acre in extent in which only members of the Middleton family, their servants and persons who had claims on them, were buried.

The remaining material evidence was that of Mr. Pennington, the people's churchwarden, who stated that he had conscientious objections to the inscription, and thought it was a dangerous inscription to have in a parish churchyard, and that of Letty Stead—the sister of Lawrence Stead, now serving in Egypt—who stated that she and her family were Roman Catholics, that the inscription was composed by her mother as being the usual inscription placed on tombstones erected to members of their faith, and, in cross-examination, that it being a Catholic inscription her family wished it to remain.

The question for my determination in this case is, whether upon the facts proved the Court would be warranted in sanctioning by a confirmatory faculty the retention in Spofforth churchyard of this tombstone with the above inscription upon it. It was submitted by counsel for Stead that the Court would be

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justified in sanctioning its retention, relying upon the decision of Sir Herbert Jenner in *Breeks* v. *Woolfrey* (1), given in the Arches Court of Canterbury in 1838, in which it was held that the defendant Woolfrey was not punishable in a criminal suit in the Ecclesiastical Court as having been guilty of an ecclesiastical offence merely for erecting a tombstone in a churchyard with the inscriptions, "Pray for the soul of J. Woolfrey" and "It is a holy and wholesome thought to pray for the dead: 2 Mac. xii. 46," unless such inscriptions could be necessarily connected with the Romish doctrine of purgatory, on the ground that prayers for the dead, unless necessarily connected with purgatory, though discouraged, are not prohibited by the Church of England, and that the burden of proving in a criminal suit that they are connected with purgatory lies on the promoter, and that if anything arose from the circumstance of the party being a Roman Catholic, or from the sense in which the words of the inscription are understood by the Romish Church, it should have been specifically pleaded; and the Court, being of opinion on the whole of the case that the offence imputed by the articles had not been sustained, dismissed the defendant from the suit.

The only other reported case on this question is that of *Egerton* v. *All of Odd Rode* (2) heard before Chancellor Espin in the Consistory Court of Chester. In that case an application was made for a faculty to erect a stained memorial glass window in the parish church of Odd Rode, with a Latin inscription under it—"Of your charity pray for the soul of H. F——, deceased, and for the soul of J. H. C——, deceased"; and the learned Chancellor in his judgment, referring to *Breeks* v. *Woolfrey* (1), observed that Sir Herbert Jenner "did not directly sanction the inscription before him; he only refused to order the tombstone which bore it to be removed," and that it did not appear that he "would himself have authorized the inscription if he had been asked to do so"; and in the result he declined to sanction the proposed inscription being placed in the church on the ground that, though in private such prayers may be offered, as conformable to the ways of the primitive

(1) 1 Curt. 880. (2) [1894] P. 15.

Church, yet that it did not belong to a Court of first instance to do what the formularies of the Church have abstained from doing, namely, to authorize the setting up in a place of public worship of an inscription demanding prayers of the worshippers for the souls of certain persons who have departed this life; but he accepted an amended inscription.

In the present case the proceedings by both parties are in a civil, and not, as in *Breeks* v. *Woolfrey* (1), in the criminal form, and the burthen of proof, therefore, lies on the petitioner in each case to satisfy the Court that under the circumstances he is entitled to the faculty he asks for.

The rector in his petition alleges that the inscription was not submitted to him for his approval previous to its being placed on the tombstone, nor was his permission obtained to its erection in the churchyard. Both these averments were established by the evidence produced by him as well as by that produced on behalf of Stead. As there can be no doubt that by ecclesiastical law the rector was entitled to have the inscriptions submitted to him for his approval, and that the tombstone in the first instance ought not to have been erected without his permission, he has made out a good case for the granting of a faculty authorizing him to remove the tombstone from the churchyard.

On the other hand, Stead in his petition prays the Court to decree him a faculty confirmatory of the retention of the tombstone with the inscription on it. But in my judgment the Court would not be justified in granting his prayer unless it is satisfied that the inscription is in all respects unobjectionable, the burden lying on him to satisfy the Court that this is so.

The Court before granting a confirmatory faculty should be satisfied upon the evidence before it that beyond all doubt the inscription was composed and placed on the tombstone with the sole intention (as was the practice amongst the early Christians long prior to the introduction of purgatory) of soliciting prayers that the souls of the deceased persons named on the tombstone might have rest and quiet in the interval

(1) 1 Curt. 880.

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between death and the resurrection, and that at the last day they might receive the perfect consummation of bliss, and that the inscription was so expressed and intended to be expressed as not to include or appear to include an invitation for prayers for the relief of the souls of the deceased persons named from the pains of purgatory: *Breeks* v. *Woolfrey* (1) As in the evidence it appears that the Stead family were Roman Catholics, the primâ facie presumption is that the inscription was intended to be an appropriate one for a tombstone erected in memory of Roman Catholics, and in regard to prayers for the dead in conformity with the doctrine of purgatory as recognised and enjoined by that Church; and such presumption receives cogent corroboration from the evidence of Letty Stead, sister of Lawrence Stead, who stated that she and her family were Roman Catholics, and that the inscription was composed by her mother as being the usual inscription placed on tombstones erected to members of their faith, and that it being a Catholic inscription her family wished it to remain.

On this evidence, in my judgment, the rector, churchwardens, and Protestant parishioners have reasonable grounds for objecting to the retention of this inscription. It is a matter also for observation that the position of members of the Church of England as well as those of the Church of Rome have been materially altered since the delivery of the judgment in *Breeks* v. *Woolfrey* (1) some sixty-three years ago in relation to the burial of their dead.

In 1838 the cost of providing consecrated ground for the burial of parishioners in their parish churchyard and the expenses of keeping the churchyard in order were chargeable on the church-rates, to which Roman Catholics contributed their quota; and the only burial grounds to which they then had access for burial were their own private burial grounds and the churchyards of the Established Church. But under the Burial Acts, the first of which was passed in 1853, it is open to them, should they not make use of their own burial grounds, to bury their dead in the burial board grounds provided out of the poor-rates, either in the unconsecrated portion—in which I

(1) 1 Curt. 880.

assume no objection would be taken to the form of inscriptions proposed to be placed on their tombstones—or in the consecrated portion, in which the inscriptions are subject to the control of the bishop of the diocese, or in the churchyards of the Established Church, which, since the abolition of compulsory church-rates in 1868, have been enlarged and kept in repair by the voluntary contributions of members of the Church, and in which the inscriptions are in the first instance subject by law to the control of the minister of the parish; but any decision come to by him may be reviewed by the Ordinary on proper application being made.

In the present case the fact that the rector, churchwardens, and parishioners of Spofforth, being members of the Church of England, who have supplied the funds for the enlargement and maintenance of their churchyard, entertain, and in my judgment not unreasonably, conscientious objections to the retention of the inscription, furnishes a further reason for the Court in the exercise of its discretion declining to grant a faculty confirmatory of the retention of the tombstone with its present inscription.

The rector having satisfied the Court on the issues on which the burden of proof lay upon him, the Court decrees a faculty to issue to him authorizing him to remove the tombstone from the churchyard. The question of costs will be reserved, with leave to the rector to file an affidavit as to the respondent's means.

The respondent's counsel then alleged an appeal against the above judgment.

1903. Feb. 13. The appeal having been withdrawn, the rector brought into Court an affidavit as to the respondent's means, and moved that the respondent be ordered to pay all the Court fees incurred in the cause by the rector.

The solicitor for the respondent opposed the motion.

DR. TRISTRAM. In this case the ground urged at the hearing by the respondent's counsel for relieving him from payment of the Court fees was that he was a corporal in the

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Royal Engineers on active service in Egypt, and without sufficient means wherewith to pay them. On perusing the rector's affidavit, I am satisfied of the respondent's ability to pay them.

By the practice of the Ecclesiastical Courts the proctors, who formerly had the exclusive right of practising in those Courts, on instituting a suit became personally responsible as officers of the Court for payment into the registry of any Court fees incurred by them on behalf of their clients, including the costs of the hearing of the suit. And the proctors for the other party were also personally responsible to the Court for the Court fees they incurred on behalf of their clients. But if the proctor who instituted the suit was successful in it, he, on paying the Court fees due from him into the registry, was entitled to ask the Court to make an order on the respondent to recoup him for such payment. And as solicitors are now by statute (1) entitled to act in suits in the Ecclesiastical Courts as proctors, they are subject to the same liability in regard to Court fees.

My order in this case will be for the rector, as he appeared in person, to pay into the registry the Court fees due from him, including the Court fees for the hearing, and for the respondent's solicitor to pay into the registry such Court fees as he may have incurred on behalf of the respondent, and for the respondent to repay the rector the Court fees he has paid into the registry. (2)

Solicitors for respondent, Lawrence Stead: *Bromet & Sons.*

(1) See 40 & 41 Vict. c. 25, s. 17.

(2) On a list of the Court fees being produced and considered by the Chancellor, the rector and respondent's solicitor came to an arrangement as to payment of the Court fees.

C. F. J.

## THE DALLINGTON.

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*Feb.* 13, 14.

*Admiralty — Compulsory Pilotage — Liability of Owner — Belgian Law — Collision in the River Scheldt.*

A collision occurred in the Austruweel Roads, below Antwerp, in the river Scheldt, between a British steamship, owned by the plaintiffs, coming down the river with a Belgian government pilot on board, and the defendants' British steamship at anchor. The Court found the plaintiffs' vessel alone to blame, the fault being that of the pilot, and evidence having been given as to the Belgian law on the question of compulsory pilotage:—

*Held*, by Bucknill J., that, though the employment of the pilot was compulsory in the sense that his fees must be paid, the pilot was by Belgian law the adviser of the master who remained in charge, and, therefore, the plaintiffs were liable for the damage sustained by the defendants' vessel.

Action of damage by collision.

The plaintiffs were the Peninsular and Oriental Steam Navigation Company, owners of the *Socotra*; the defendants were the Southdown Steamship Company, Limited, owners of the *Dallington*.

The case is reported on the question of the liability of a shipowner for damage resulting from the negligent navigation of his vessel whilst under compulsory pilotage in Belgian territorial waters.

The material facts were shortly as follows:—

On February 1, 1903, about 7 A.M., the British twin-screw steamship *Socotra*, of about 3600 tons register, with a tug ahead, and a licensed Belgian government pilot on board, was proceeding down the river Scheldt from Antwerp to London, when she came into collision with the British screw steamship *Dallington* of 2534 tons gross register, at anchor in Austruweel Roads.

In an action brought by the owners of the *Socotra* against the owners of the *Dallington*, the Court (Bucknill J., assisted by two of the Elder Brethren of the Trinity House) found that the *Socotra* was alone to blame for the collision, the fault being that of the pilot.

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The plaintiffs by their defence to the defendants' counterclaim pleaded that "The *Socotra* by the Belgian law in force at the time and place of the collision was compulsorily in charge of a duly appointed pilot, all of whose orders were duly obeyed by those on board the *Socotra*, and if the collision was due to any improper manœuvre or navigation on the part of the *Socotra* (which is denied), it was exclusively occasioned by the negligence of the pilot."

Evidence of the law of Belgium relating to pilotage was given by two Belgian advocates, one being called on each side. It was proved that vessels such as the *Socotra*, in those waters, were bound to take on board, or at any rate pay, the Government pilots; but the advocate for the plaintiffs stated that there was no express provision in the Belgian Code by which the pilot was declared not to be in charge, that is, that his duty was restricted to acting as the adviser of the master, though he admitted that the shipowner in Belgium could not rely upon pilotage as a defence. The advocate for the defendants referred to a Belgian text-book (1), and to art. 228 of the Belgian Commercial Code, as establishing the position that, though the fees must be paid, and, in that sense, pilotage was compulsory, the pilot did not supersede the master, but acted only as his adviser, so that the presence of a pilot on board was no defence to the liability of the ship for a collision caused by the default of those in charge. (2)

Feb. 14. *Rowlatt* and *Finlay*, for the plaintiffs, the owners of the *Socotra*, in support of the plea of compulsory pilotage. As there is no express provision in the Belgian Code declaring that the pilot is not in charge, that is to say, declaring that the

(1) Droit Maritime Belge, by V. Jacobs, late Minister of Justice, bk. ii. art. 919, p. 514.

(2) The Code of Maritime Commerce of Belgium, forming the second book of the Commercial Code, was revised in 1879, and received the Royal assent on August 21 of that year. The material portion is as follows:—

"Code de Commerce, Livre ii. Titre viii. De L'Abordage. Art. 228 . . . . Si l'abordage a été causé par une faute, tous les dommages sont supportés par le navire à bord duquel la faute a été commise. La présence de pilotes ne fait pas obstacle à la responsabilité établie par le paragraphe précédent."

pilot is only to act in conjunction with or subject to the approbation of the master, and having regard to the terms of art. 228 of the Belgian Commercial Code, it may well be that according to the theory of Belgian lawyers the shipowner in Belgium cannot rely upon pilotage as a defence; but that will not avail to saddle the owner of a British ship with liability for damage when sued in this country in respect of a collision in Belgian waters. In this case the pilot of the *Socotra* was, in fact, in charge, that is, he was conducting the navigation of the vessel, and all his orders were obeyed by the master and crew. His presence on board was compulsory in the sense that the fees for pilotage had to be paid. The doctrines of the English law will, therefore, be applied, the test being the compulsory payment of the pilotage dues, and the shipowner can claim exemption from liability in accordance with the principles embodied in s. 633 of the Merchant Shipping Act, 1894, by which "an owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within a district where the employment of a qualified pilot is compulsory by law." This provision is only declaratory of the common law by which liability cannot be entailed for the negligence of a person who is not the servant or agent of the owner of the ship: *The Halley*. (1)

[Reference was also made to *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (2)]

*Aspinall, K.C., Dawson Miller*, and *Dunlop*, for the defendants, the owners of the *Dallington*. Although the payment of the pilotage dues is compulsory, the shipowner is liable for the negligence of the pilot, because the Belgian law adopts similar views to those recognised on the Suez Canal: *The Guy Mannering* (3); in France: *The Augusta* (4); on the Danube: *The Agnes Otto* (5); and in Holland: *The Prins Hendrik* (6); that is, a distinction is drawn between a pilot being compulsorily

(1) (1868) L. R. 2 P. C. 193.
(2) (1868) L. R. 3 Ex. 330; (1869) 4 Ex. 238.
(3) (1882) 7 P. D. 52, 132.
(4) (1887) 6 Asp. M. L. C. 161.
(5) (1887) 12 P. D. 56.
(6) [1899] P. 177.

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in charge so as to supersede the master, as in English law, and being compulsorily on board. By Belgian law, according to the evidence, the pilot only acts as the adviser of the master who remains in charge.

*Rowlatt*, in reply.

BUCKNILL J. Counsel for the plaintiffs, the owners of the *Socotra*, have given me every assistance; but, on the authorities, my judgment on this point of law must be against them. Put shortly their argument comes to this—that, because there is an omission, so to speak, or rather no positive declaration in terms by the Belgian law, that pilotage is not compulsory, in the sense that the pilot is not in charge, I am to assume that it is compulsory in the sense in which they argued. Now we have had the evidence of two Belgian lawyers, and they both agree that according to their law, to the extent to which it is to be found in terms, the pilot is only an adviser, and the owners of the vessel are responsible for damage done.

In this case it may be that the master did hand over the navigation of his ship entirely to the pilot. He stated that, in fact, he had done so, and that all the orders were given by the pilot, and that all those orders were carried out by the crew. So, in point of fact, the pilot was solely in charge; but as Lord Esher M.R. said in the case of *The Augusta* (1), "We are concerned with the law of England, and in an English action we are bound by the law of France, because the law of France establishes what are the circumstances of the appointment and employment of the pilot." So far as the law of Belgium is in writing it is to be found in art. 228 of the Code, which when translated runs: "If the collision be caused by the default of any person, all the damages are borne by the ship on board of which the default has been committed. The presence of a pilot on board is no defence to this liability."

It seems to me that it would be difficult, in the face of that article, to do other than find that, whether the pilot is on board or not, makes no difference as to the responsibility of the owners where damage is caused in consequence of the negligence of

(1) 6 Asp. M. L. C. 161.

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those in charge of the ship. At any rate, the opinion of the Belgian lawyers is that the owners are responsible, because the pilot, although compulsory in one sense, is not by law compulsorily in charge. In Belgium ships must take a pilot, and if they do not take him they must pay his fee, so that when a pilot comes on board the master may say, "You may go away or you may come on board, and I will pay your fee, but I do not want you." But pilotage is compulsory in the sense that if the master does not choose to take the pilot he cannot get out of the responsibility of paying the pilot's fee.

With regard to the authorities cited during the argument, *The Halley* (1) is not in point for the reasons given by Lord Esher in his judgment in *The Augusta* (2), which case, together with *The Guy Mannering* (3) and *The Prins Hendrik* (4), establish the view I am taking, namely, that, according to Belgian law, though a pilot may be compulsory in the sense that if he is not accepted he must still be paid for, yet he is not a person legally in charge; the result being that, although, in point of fact, the pilot is navigating and solely in charge, yet if the ship does damage in consequence of negligent navigation the owners are, according to Belgian law, responsible.

Solicitors for plaintiffs, the owners of the *Socotra*: *Freshfields*.

Solicitors for defendants, the owners of the *Dallington*: *Thomas Cooper & Co.*

(1) L. R. 2 P. C. 193.
(2) 6 Asp. M. L. C. 161.
(3) 7 P. D. 132.
(4) [1899] P. 177.

T. L. M.

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*March* 2.

## TWENTYMAN *v.* TWENTYMAN.

*Divorce—Permanent Maintenance—Lump Sum—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

The Court has no power to order a lump sum to be paid over to the petitioner by way of permanent maintenance.

MOTION upon registrar's report on petition for permanent maintenance.

On November 10, 1902, a decree absolute on the petition of the wife was pronounced on the ground of the respondent's adultery and cruelty.

The marriage took place in August, 1900, and the only child of the marriage was born in August, 1901.

From the report of the registrar upon the petition for permanent maintenance, it appeared that the respondent had neither business nor occupation; that for many years his expenditure had greatly exceeded his income, and that his capital had thereby become greatly diminished.

Dealing with the figures, the registrar reported that on November 21, 1902, the respondent admitted being possessed of certain securities, the market value of which, on January 30, 1903, amounted to 23,578*l.* 10*s.*, and he also admitted being possessed of a leasehold house and furniture together worth about 625*l.*

Among the securities owned by the respondent were some, estimated to realize 5304*l.*, which produced no income, the remainder being a large block of shares in the Oceana Consolidated Company, Limited.

The respondent stated his income to be only 443*l.* a year.

The report concluded with the following recommendation:—

"It is submitted that this is a case in which a sum of 8000*l.* should be realized by sale of securities and assigned to trustees of a deed to be settled by one of the conveyancing counsel of the Court, in trust to pay the income arising therefrom to the petitioner for her life for the maintenance of herself and child, and on her death for the benefit of the said child."

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The petitioner's solicitors gave notice of motion "to confirm the registrar's report as to maintenance, with the following variation, viz., that 100*l.*, part of the sum of 8000*l.* mentioned therein, be paid to the petitioner in cash."

The respondent's solicitors filed a cross-motion, asking that the report should be varied "by reducing the sum of 8000*l.* to a sum of 4000*l.*, and by ordering that the sum of 4000*l.* or 8000*l.* be paid to trustees upon trust" to pay the income to the petitioner during her life, and upon her death "in trust to pay the capital to the respondent, his executors, administrators, and assigns," and the respondent asked for such further and other order as might seem just.

*Cannot*, for the petitioner. A lump sum may be awarded by way of permanent maintenance: *Morris* v. *Morris*. (1) Taking the language of the 32nd section of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), it seems that the Court would not have power, if it ordered an annual payment, to direct that it should continue to be paid for a period exceeding the lifetime of the petitioner; but where the Court orders a lump sum, it has power to order it to be paid to the petitioner absolutely. That power ought not to be curtailed where the petitioner is seeking to have the lump sum settled upon herself for her life, so that the child of the marriage which has been dissolved shall benefit after the life of the petitioner. The decision in *Morris* v. *Morris* (1) has been followed more than once by Gorell Barnes J., and in the most recent case the application was made by the counsel now representing the respondent: *Stanley* v. *Stanley* (2); *Kirk* v. *Kirk*. (3)

*Barnard*, for the respondent. The registrar was wrong on the question of principle. Under s. 32 the Court has no power to give to the wife a lump sum of money absolutely. It has only power to give an annual sum secured upon the property of the respondent, or to give a gross sum secured upon the said property. The question of any allowance for the child does not come within s. 32 at all; the power of the Court in

(1) (1861) 31 L. J. (P. & M.) 33.
(2) [1898] P. 227.
(3) [1902] P. 145.

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reference to ordering an allowance for the child is conferred by s. 35. It is true, that, in each of the cases cited in support of the petitioner's application, the Court has made an order for a lump sum, but in none of those cases was the power of the Court challenged. The point is now definitely raised for the first time, and the Court must decide it.

The question as to the Court having no power to order security for a child's allowance was considered and decided by Sir James Hannen in *Hunt* v. *Hunt*. (1) That was an application to secure an allowance for children after a decree of judicial separation; but, under s. 35, the children of a dissolved marriage are placed on the same footing as the children of a marriage the parties to which have only been judicially separated. That being so, the registrar is clearly wrong in suggesting that there should be in this case a settlement of a sum on the petitioner for life and afterwards for the children. The registrar probably imagined that he possessed the necessary power by virtue of s. 45; but that is a very different section, and deals only with property of a guilty wife.

If the Court had power to award a sum to the petitioner absolutely, it would not give so large a proportion as one-third of the whole capital of the respondent. The utmost that the Court should order in this case is security for the income of 8000*l.* for the petitioner's life.

*Cannot*, in reply. The Court has power to do one of two things: either to make an order for the income to be secured to the petitioner for her life, or to give her a lump sum.

[THE PRESIDENT. Then the word would be "pay," and not "secure." All that Gorell Barnes J. did in *Stanley* v. *Stanley* (2) was to give a sum of 320*l.* to the petitioner and her children, and that may have been said to be under s. 35 (20 & 21 Vict. c. 85), and, moreover, it was done ex parte. I should incline to the view that, if the Court has power in this case to order a lump sum, it would have power to order it to be secured for the benefit of the children after the petitioner's death.]

The reason for wishing this to be done is that the petitioner's health is very precarious, and she desires to see her children

(1) (1883) 8 P. D. 161.

(2) [1898] P. 227.

provided for in the event of her death. But if the Court should come to the conclusion that this cannot be done, the Court should order a separate provision to be made for the children. The respondent has no business, and his capital is diminishing year by year. He may, moreover, leave the country, as he has threatened to do. The Court, following the principle to be deduced from the judgment in *Newton* v. *Newton* (1), should grant an injunction restraining him from parting with his property.

[THE PRESIDENT. I am inclined at present to think that s. 32 only gives power, in ordering a gross sum, to order it to be secured for the petitioner's life. But there is s. 35, which gives the Court power to order a provision to be made for the children. Would it not be competent to make an order under both sections?]

*Barnard*, for the respondent. The language of s. 35 is so different from that of s. 32 that there is nothing which should lead the Court to hold that under s. 35 there is power to order security. If the Legislature had intended that an allowance for children should be secured, it would have said so in s. 35 in the same distinct words as it has employed in s. 32.

JEUNE P. (after stating the facts and the recommendations in the registrar's report). This case raises the question, which I must now determine, whether the Court has power to carry out the recommendations in the registrar's report, and I am sorry to have to come to the conclusion that the Court has not that power. It was contended that the words in s. 32 [read], "such gross sum of money," are not governed by the subsequent words, "not exceeding her own life," and that these words apply only to the security. If that were so, I should think it would be in the power of the Court to impose on a petitioner the obligation of settling such gross sum as the respondent might be ordered to pay. But I cannot so read the section; and I am led to the view I now hold—in spite of the steps, which of course it is not my business to regard, as to how those words came to be inserted—by the observation that that applies both to the gross and to the annual

(1) (1885) 11 P. D. 11.

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sum of money mentioned in the section. With regard to the annual sum of money, it must be clearly a securing by settlement in the ordinary way; and when a gross sum is ordered, that must also be secured, and not paid over to the petitioner; and it can only be secured for some period not exceeding the lifetime of the petitioner. I have now come to the clear conclusion, after hearing this point raised and argued for the first time, that the Court has no power under s. 32 to order a lump sum down by way of permanent maintenance. This decision may seem a departure from those given in *Morris* v. *Morris* (1) and *Kirk* v. *Kirk* (2), and also, to a certain extent, from *Stanley* v. *Stanley* (3); but in neither of those cases does the point appear to have been raised by counsel for the respondent, and in one at least the order for a lump sum was made by consent. I say this because, from the report of *Morris* v. *Morris* (1), I observe that there was an offer by the respondent to pay a sum of 1000*l.*, and I cannot help thinking that the Judge Ordinary was influenced by that. But, however that may be, it certainly was not contended in *Morris* v. *Morris* (1) that the gift of a lump sum could not be made absolutely to the petitioner, and so the point which I have been called upon to decide to-day was never raised. In *Kirk* v. *Kirk* (2) Gorell Barnes J. had only the case of *Morris* v. *Morris* (1) before him, and he ordered a lump sum of 6000*l.* to be paid by the respondent to the petitioner without any opposition on the part of the respondent or anybody.

In *Stanley* v. *Stanley* (3), where the Court was dealing with very small means, Gorell Barnes J. also followed the case of *Morris* v. *Morris* (1), and ordered payment of a lump sum.

But, notwithstanding those decisions, having regard to the plain words of the Act and to the fact that the point has now been definitely raised and argued for the first time, I cannot say that I have power to make the order asked, although I should have been glad if I could have seen my way to do so.

Sect. 35, moreover, does not give me the requisite power, though, but for a direct decision of Sir James Hannen (4), I

(1) 31 L. J. (P. & M.) 33.
(2) [1902] P. 145.
(3) [1898] P. 227.
(4) *Hunt* v. *Hunt*, 8 P. D. 161.

should have thought that the words were wide enough. With all respect to that decision, the words do not appear to me to be limited. The case appears, however, to be exactly in point, and is binding on me. There was in that case a sum of 1400*l.* available for purposes of settlement. The Court was asked that some part of that sum should be set aside for the children, and the point was taken that the Court had no jurisdiction to make such an order; that s. 35 only gave a general power to make provision for children's maintenance after decree; and that, if the Legislature had intended to give the Court authority to order a sum to be secured for the children, it would have used express language for the purpose, as in s. 32. The President (Sir James Hannen) thereupon said: "I am of opinion that I have no power to make the order asked for"; and he rejected the motion accordingly.

The order which I make in the present case is that the sum of 8000*l.*, which appears to me to be a proper sum under all the circumstances, should be realized, and should be secured by the respondent for the petitioner for her life by a proper deed to be prepared by the conveyancing counsel of the Court. Any allowance for the child must be the subject of a separate application. There remains only the question of an injunction. Although I do not wish to express any formal opinion against the respondent, I think that I should accede to the request of the petitioner in ordering that he be restrained from parting or dealing with his property in any way which might hinder the security for the 8000*l.* being completed in the way I have ordered.

With regard to the petitioner's request that 100*l.* should be paid to her out of the 8000*l.*, I think that 100*l.* should be ordered to be paid to her at once on account of income.

Solicitors for petitioner: *Beardall & Co.*
Solicitors for respondent: *Steavenson & Couldwell.*

H. D. G.

1903
*March 2.*

## E. *v.* E. (OTHERWISE T.).

*Nullity—Variation of Settlement—Order—Power of Court to rectify.*

Where a mistake has been made in drawing up an order the Court or a judge has power to alter it, even where it is under appeal and though the request for alteration be made by the party who has given notice of appeal against the order as drawn up.

THIS was an application arising out of a petition to vary the settlement upon a marriage which had been declared null and void.

On June 2, 1902, after report by the registrar, an order was made by the President, and this, after being settled by one of the conveyancing counsel and submitted to the respective solicitors and counsel for the parties for approval, was drawn up in the following terms :—

"It is ordered that the trustees [naming them] of a certain indenture of settlement dated the 24th day of October, 1898, and made . . . . between the respondent [naming her] of the first part, the petitioner [naming him] of the second part, and the trustees of the third part (being the settlement made in contemplation of the marriage . . . .), do as from the 29th day of October, 1900, being the day of the date of the decree absolute, stand possessed of the sum of 50,000*l.*, by the said indenture of settlement firstly assigned by the respondent after the share, estate, or interest of the respondent under the will of S. T. out of which the said sum is to be raised and upon which the same is in the meantime charged shall fall into possession, and also of the annual or other income thereby secondly assigned by the respondent, and which, pending the falling into possession of the said share and premises, shall be payable to the respondent under the trusts of the said will of the said S. T., upon trust out of the said annual or other income secondly assigned until the said share and premises shall fall into possession, and afterwards out of the dividends, interest, and income of the said sum of 50,000*l.*, or

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the investments representing the same, or until the said sum of 50,000*l.* shall have been raised out of any income which may come to the hands of the said trustees in respect of the said share, estate, and interest of the respondent under the trusts of the said will to pay to the petitioner during his life as from the said 29th day of October, 1900, the annual sum of 200*l.*, such annual sum to be payable by equal half-yearly payments on the 29th day of April and the 29th day of October in every year, the first of such payments to be deemed to have become due and payable on the 29th day of April, 1901. And that subject thereto the said trustees stand possessed of the said sum of 50,000*l.* and annual or other income assigned by the respondent by the said indenture of settlement upon the trusts that would be applicable thereto if the petitioner were dead leaving the respondent him surviving. And it is ordered that a copy of this judgment be indorsed upon the said indenture of settlement. And it is ordered that the respondent [wife] do pay to the petitioner his costs of and consequent upon this petition, such costs to be taxed . . . ." [Signed by the registrar.]

On November 8, 1902, upon hearing counsel for the petitioner, respondent, and trustees, the President made a further order, "that the trustees of the indenture of settlement of the 24th October, 1898, *referred to in the order herein dated the 2nd June*, 1902, out of all moneys being income of such settlement now in their hands or to be hereafter received by them (after deducting from such moneys their costs, charges, and expenses of and incidental to the petition for variation of settlement, and the costs of all parties of and incidental to this application), do pay to the petitioner the arrears under the said order, as to any balance of the said moneys now in their hands to pay the same within ten days from the date of this order, and as to any moneys to be thereafter received by them to pay such moneys within ten days from the date when the same shall have been received by the trustees: the respondent to be entitled to a charge on the capital sum of 50,000*l.* comprised in the said settlement for the amounts retained and paid by the trustees out of income for costs in pursuance of this order, together with interest from the dates of such retention

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and payment by the trustees at the rate of 4 per cent. per annum. No proceedings to be taken to enforce such charge till the said capital sum falls into possession. Liberty to apply." [Signed by the President.]

Notice of motion was given for February 9, 1903, by the petitioner, asking for an order that the trustees (naming them) of the indenture of settlement of October 24, 1898, "referred to in the order herein dated the 2nd June, 1902, and in a further order herein dated the 8th November, 1902, be ordered to take such steps or proceedings against the trustees or trustee for the time being of the will and codicil of" S. T., deceased, ". . . . as may be necessary to recover or collect from the trustee or trustees of the said will and codicil such sums as they have in hand due to the trustees of the said settlement, or for such further or other order as the Court might deem just and necessary to the enforcing of the said order of November 8, 1902."

Upon the motion coming on, exception was taken to the order of June 2, 1902, as drawn up, and the motion was thereupon adjourned.

A summons was then taken out on behalf of the respondent, calling upon the petitioner to "shew cause why the orders in this suit dated 2nd June, 1902, and 8th November, 1902, should not be altered so as to read in accordance with the orders actually made by the Right Hon. the President." This summons was adjourned into Court, to be heard on the same day, and immediately before, the adjourned motion.

The facts connected with the drawing up of the order of June 2, 1902, appeared to be that, after judgment had been delivered, the petitioner's leading counsel (Inderwick, K.C.) suggested that an order should be drafted and submitted to the President, who assented. It was then further suggested that the opinion of conveyancing counsel should be taken as to the form of order that would be required to give effect to the judgment, and that the draft should be submitted to counsel for the respondent.

In due course it was so submitted, but upon the advice of counsel for the respondent it was returned to the petitioner's

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solicitors, accompanied by a letter (July 17, 1902) stating that on considering the matter they had come to the conclusion that they could not approve the order in its present form, having regard to the fact that they were appealing from it, and intimating that they thought it would be best that it should be drawn up by the registrar in the ordinary course.

The order was accordingly drawn up in the form settled by Mr. Bradley Dyne, the conveyancing counsel, and was passed by the registrar.

The appeal against the order of June 2, 1902, was entered for hearing in the Court of Appeal on August 12, and at the date of these present applications was still pending.

*Priestley*, for the respondent, in support of the summons, referred to *Paul* v. *Paul and Farquhar*. (1)

*Low*, *K.C.*, (*Henlé* with him), for the petitioner. There is no precedent for altering an order under such circumstances. The order has been settled and passed, and the respondent is appealing against it as drawn up. If there was ever any ground for alteration, it is now much too late.

JEUNE P. I shall allow the rectification asked for by the respondent in her summons. There has been a mistake by the Court—partly made by myself and partly by the registrar. I omitted to mention the date from which the payments were to run, and which ought to have been fixed, in accordance with the invariable practice, as from the date of the order for variation of the settlement. The order of June 2, 1902, as settled and drawn up, must be altered by making the payments of 200*l.* a year payable from June 2, 1902, by half-yearly instalments on June 2 and December 2 in each year, the first instalment, due on December 2, 1902, to be paid at once to the petitioner by the trustees out of the income due to the respondent and now in their hands.

The petitioner's taxed costs of this summons must be paid by the respondent. The petitioner's motion now becomes

(1) (1870) L. R. 2 P. & M. 93, at p. 96.

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unnecessary, but, in dismissing it, I order that the respondent pay all the costs thereof. (1)

*Leave to appeal refused.*

Solicitors for petitioner: *Nicholson, Graham & Co.*

Solicitors for respondent: *Miller, Smith & Bell, for Fowler, Langley & Wright, Wolverhampton.*

H. D. G.

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1903

*March* 16.

## GORDON *v.* GORDON AND BELL.

*Divorce—Practice—Pleading—Custody of Children—Paternity.*

If a wife, respondent in a suit for dissolution of marriage, wishes to raise any question as to the paternity of any child or children whose custody is claimed by the husband (petitioner), she must file an answer in the suit specifically raising the question as to the paternity of such child or children; and, unless she so plead, she will not be allowed at the hearing to raise any question as to the paternity, in opposition to her husband's application for custody of such child or children.

HUSBAND'S suit for dissolution, claiming damages against the co-respondent.

The petition set forth the marriage of the petitioner and respondent in 1892, and that there were "three children issue of the marriage," the youngest "born on April 24th, 1900"; and the prayer to the petition included a clause asking for the custody of the said children.

The respondent appeared to the citation, but filed no answer.

At the trial it was stated that the counsel for the petitioner and for the co-respondent had agreed the damages at 2000*l.*

It appeared, from the uncontradicted evidence given by and on behalf of the petitioner, that, in 1899, when stationed in India, he allowed the respondent to go to one of the hill stations about April, and himself joined her there on or about August 1, 1899; that early in 1901 they returned to England,

(1) Upon the motion, Mr. Watson, one of the trustees, was separately represented by *Dr. T. B. Napier*, instructed by *E. F. Champion*, solicitor. The other two trustees were represented by the same counsel and solicitors as the registrar.

and the petitioner was on active service in South Africa during the greater part of 1901 and until September, 1902, when he returned to England and received orders to proceed in the following month to India.

The respondent, on hearing this, made a communication to her husband, and, upon his inquiring what she really meant, she told him that she had misconducted herself with the co-respondent in India during the years 1898, 1899, and 1900, and in England in 1901. In a written confession which she afterwards signed, she stated that she had misconducted herself with the co-respondent in August, 1899, and that he was the father of her child born in April, 1900.

*Barnard*, for the co-respondent, said that the damages had been settled by agreement at 2000*l.*

At the close of the petitioner's evidence,

*Bayford*, for the respondent, asked leave to cross-examine the petitioner on the question of the paternity of the youngest child.

*Priestley*, *K.C.*, for the petitioner, said that, as his client desired the matter to be disposed of on that day, he was instructed not to object.

THE PRESIDENT. It is most irregular; but, as the petitioner does not object, and as there is no rule of practice positively prohibiting it, I will allow it in this case.

The petitioner was thereupon cross-examined, and emphatically maintained that he was the father of the child in question, as well as of the two elder children of the marriage.

The jury formally awarded the amount agreed upon by way of damages, and the Court pronounced a decree nisi with costs against the co-respondent, and ordered the damages to be paid into court as usual.

Upon the question of custody,

*Bayford*, for the respondent, asked that the question should be referred to chambers.

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THE PRESIDENT. There is no evidence that the petitioner is not the father of the child in question, and the petitioner himself emphatically asserts that he is.

*Bayford.* There is the statement in the wife's written confession. She has quite recently changed her solicitors, and is not prepared to go fully into the matter to-day.

THE PRESIDENT. That has nothing to do with it. The petitioner claimed the custody in the petition, and the respondent should have filed an answer specifically raising the question of paternity if she intended that this should be done at the trial. I wish to lay it down unequivocally, for guidance in future cases, that, where a respondent intends to raise a question as to the paternity of a child or children in respect of whose custody the Court is asked to make an order, such respondent must raise it specifically in answer to the petition, so that the other side may have due notice and be prepared to meet it. In the present case, I see no reason for not giving the petitioner the custody of all the children, which he asks, and I make the order accordingly.

Solicitors for petitioner: *Hopgood & Dowson.*
Solicitors for respondent: *Poole & Robinson.*
Solicitors for co-respondent: *Warren, Murton & Miller.*

H. D. G.

## THE MANAR.

1903
*March* 2, 9, 16.

*Admiralty—Practice—Staying Proceedings—Mortgage—Action in this Country for Declaration of Rights to assist Action in Foreign Country—Rules of Supreme Court*, 1883, *Order* XXV., *r.* 5.

The plaintiffs, mortgagees of a British ship, on default in payment of the mortgage money, took possession of the vessel and chartered her for a voyage to a French port. On arrival there the vessel and her freight were arrested by the defendants, British subjects, claiming as creditors of the mortgagors for necessaries supplied to the ship, and in respect of which they had rendered "executory" in France a judgment obtained by default in England. The mortgagees intervened in the proceedings in France, and, for the purpose of assisting them in those proceedings, they commenced separate actions against the defendants, the necessaries men, and the defendants, the mortgagors, asking, under Order XXV., r. 5, of the Rules of the Supreme Court, 1883, for declaratory judgments that they as mortgagees in possession were entitled to the ship and her freight in priority to the necessaries men and to the mortgagors. Both defendants moved to stay the actions as vexatious:—

*Held*, by Bucknill J., that the action against the defendants, the necessaries men, would be allowed to proceed, for the opinions of foreign experts were conflicting as to the force to be attributed to an English judgment in a French Court, and no other sufficient evidence had been given to shew that, in the proceedings in France, the declaratory judgment asked for would not be of use to the plaintiffs to protect their interests as mortgagees of the vessel and owners of the freight; but that the action against the other defendants, the mortgagors, would, on the authority of *Brooking* v. *Maudslay, Son & Field*, (1888) 38 Ch. D. 636, be stayed, as the mortgagors, not having taken any active step to dispute the validity of the mortgage, could not be forced to try that issue in the present proceedings.

MOTIONS, first, by defendants Strachan Brothers, necessaries men, and, secondly, by defendants, the Manar Steamship Company, Limited, owners of the steamship *Manar*, to stay actions brought by the plaintiffs, the Northern Trust, Limited, mortgagees of the *Manar*, seeking declaratory judgments (under Order XXV., r. 5 (1)), as to the rights of the plaintiffs in the *Manar* and in her freight.

(1) Rules of the Supreme Court, 1883, Order XXV., r. 5: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

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For convenience the two motions were heard together.

The facts were shortly as follows:—

On January 13, 1900, the Manar Steamship Company, Limited, was incorporated. On June 26 a registered statutory first mortgage of the British registered steamship *Manar* for 17,000*l.* and interest at 7 per cent. was executed by her owners, the Manar Steamship Company, Limited, as collateral security in favour of the plaintiffs, the Northern Trust, Limited, trustees for debenture-holders, under a trust deed of the same date.

The Manar Steamship Company having made default in payment of principal and interest under the mortgage, the Northern Trust, Limited, in March, 1902, took the necessary steps by notice to the master, and to the then charterers, to acquire possession of the vessel, which was in American waters, and, on the expiration of the then charter, the plaintiffs, on April 28, chartered her to a Peruvian firm to carry a cargo of phosphates from Beaufort, South Carolina, to St. Nazaire in France.

On May 5 an extraordinary resolution was passed for voluntarily winding up the Manar Steamship Company, and that liquidation is still proceeding.

The *Manar* arrived at her destination at the end of May, and the French consignees took delivery of the cargo and became liable for the freight. On June 10 the defendants, Strachan Brothers, ship chandlers of Newcastle, as creditors of the owners of the *Manar*, took proceedings in the Tribunal of Commerce at St. Nazaire and arrested the vessel under a claim for 19,500 francs in respect of a balance of account due from the Manar Steamship Company for stores supplied in 1901 in England and New York to the *Manar*, and another vessel at that time owned by the same company. On June 17 an order was made by the French Court directing the plaintiffs, through the master, G. W. Denton, to give bail in 25,000 francs to answer the claim of Strachan Brothers, and also directing the defendants, Strachan Brothers, to give bail to the master in 20,000 francs to meet a claim for damages if it should turn out that the arrest was wrongful.

On June 21 the *Manar* was released, and, on the same day,

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judgment by default was obtained in the King's Bench Division by Strachan Brothers against the Manar Steamship Company for the amount of their claim (754*l.* 16*s.* 9*d.*) and costs (4*l.* 14*s.*), the freight having previously been attached in the hands of the consignees in France by Strachan Brothers, by the Barry Graving Dock and Engineering Company, Limited, in respect of a claim for repairs to the *Manar*, and by the master of the vessel.

On October 10, on the certificate of an English barrister as to the rights of a mortgagee, the plaintiffs' mortgage was declared to be entitled to recognition. On October 13, by a judgment of a civil tribunal in Paris, the judgment of Strachan Brothers obtained in the King's Bench Division was made "executory" in France as against the *Manar* and her freight. On October 30 the tribunal at St. Nazaire declared the English judgment of Strachan Brothers to be "executory" in France. On November 8 the plaintiffs obtained a judgment of the Court at St. Nazaire confirming the previous recognition, and thereby the mortgage became "executory" in France. On November 15 the same tribunal declared the attachment of freight by Strachan Brothers, in the name of *Dixon* v. *Manar Steamship Co.*, to be valid, and on November 18 that Court made a similar declaration with regard to the plaintiffs' mortgage. On December 2 the plaintiffs, the Northern Trust, Limited, commenced proceedings in the Court at St. Nazaire to have the declaration of the validity of the arrest of the freight by Strachan Brothers set aside, and applied for leave to summon the defendants, Strachan Brothers, to have it declared that they had no rights over the vessel, and also commenced proceedings against the same defendants and all the consignees of cargo to obtain judgment that all the arrests of freight were invalid, and for an order that the consignees of the cargo should pay the freight to the plaintiffs as mortgagees. On December 12 notice of these proceedings was served on the defendants, Strachan Brothers, at Newcastle, who entered an appearance at St. Nazaire.

On January 20, 1903, the plaintiffs issued the writ in the present action. On February 26 the register of the *Manar* was

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closed, and the vessel sold by the plaintiffs, as mortgagees in possession, to Swedish purchasers. On February 27 a statement of claim was delivered claiming a declaration that the plaintiffs were and had been throughout the year 1902 the duly registered first mortgagees of the steamship *Manar*; that the mortgage was valid; that from the date of the mortgage they were, so far as was necessary for making the ship available as a security for the mortgage debt, the owners of the ship, and entitled to the ship and to any bail given for the release of the ship in priority to the Manar Steamship Company and to the defendants; that they, as mortgagees in possession, were, in April, 1902, entitled to take possession of the steamship; that upon taking possession they were entitled to the steamship and to claim against any bail given for her release in priority to the Manar Steamship Company and to the defendants, and were entitled in priority to the Manar Steamship Company and to the defendants, to collect and keep all freights earned by the steamship while in their possession, and in particular the freight earned by the vessel under the charterparty made for the voyage from Beaufort to St. Nazaire in 1902.

On the issue of the writ the defendants, Strachan Brothers, applied in chambers (January 30) to have the action instituted against them stayed or dismissed with costs. On February 4 the liquidator of the Manar Steamship Company, Limited, on whom a similar writ had been served, applied in chambers for an order that all further proceedings in the plaintiffs' action against the defendant company be stayed absolutely, or stayed until the plaintiffs indemnified the defendant company against all costs. These summonses were treated as notices of motion and adjourned into Court. In the meantime an application had been made to the French Court to fix, on March 7, the date of the hearing to determine priorities.

March 2. Affidavits of French lawyers, filed on behalf of the plaintiffs, were read in Court, stating in effect that the French Court would apply English law, and, therefore, it would greatly assist the plaintiffs in their proceedings in France if the most satisfactory evidence of that law, namely, a declaratory judg-

ment by an English Court, were obtained shewing that, according to English law, the plaintiffs as mortgagees were entitled to take possession of the vessel, and on doing so were, as such mortgagees, and also as subsequent charterers, entitled to the freight as against the Manar Steamship Company and their creditors. On the other hand, affidavits of French lawyers, filed by the defendants, stated in effect that the French Court would decide the question according to French law, and would not be bound by the decision of a foreign Court, though, if it became necessary to consider any question of English law, evidence of that law given by English lawyers would be received by way of affidavit or certificate, the judgment of an English Court having no further force than as such evidence.

*Robson, K.C.*, and *Adair Roche*, in support of the motion on behalf of the defendants Strachan Brothers. The questions raised in the present action must be determined in the Tribunal of Commerce at St. Nazaire, where the defendants are suing as creditors of the ship for necessaries. The writ issued in this country is therefore irregular, and the action should be stayed or dismissed as frivolous, vexatious, and an abuse of the process of this Court. The indorsement on the writ discloses no cause of action. The facts are not in dispute, and, as early as June, 1902, both the plaintiffs and the defendants were before the French tribunal, in whose custody the ship then was, and in whose custody its equivalent bail now is. The consignees of the cargo are under notice not to pay the freight over until the French Court has decided to whom it is due. The property represented by the bail and the freight is, therefore, in the power of the French Court, before which all the parties are, including the plaintiffs. No doubt this Court has jurisdiction under s. 11 of the Admiralty Court Act, 1861 (24 Vict. c. 10), to deal with claims in respect of any duly registered mortgage; but that section does not give jurisdiction to answer a series of hypothetical propositions of English law concerning a mortgage which has nothing to do with the defendants Strachan Brothers, who are not parties thereto, and if the Court does answer the

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questions asked to prove English law, the answers will neither decide the rights of the parties nor be acted upon. Any such rights, whether involving the plaintiffs' mortgage or not, will be determined in the creditors' proceedings before the French Court in accordance with the lex fori, that is, French law; and even if the French Court should hold that, in deciding on the distribution of the property, questions arise as to the English law governing the validity of the plaintiffs' mortgage, such questions can only be properly decided by evidence on oath, by affidavit or otherwise, produced in the French Court.

As the Court cannot in this case make the "binding" declarations of right required by Order xxv., r. 5, the action is not sustainable under that rule, and, as no reasonable cause of action in this country is disclosed between the plaintiffs and the defendants, the plaintiffs' statement of claim should be struck out under rule 4 of the same order. In this case, as in *In re Maudslay, Sons & Field* (1), the assets are out of the jurisdiction of the Court. There a debt was due to a company from a French firm, and English creditors of the company took proceedings in France for the purpose of attaching the debt. It was held, on the authority of *Liverpool Marine Credit Co.* v. *Hunter* (2), that the existence of a charge created by debentures, though valid according to English law, did not entitle debenture-holders to prevent the English creditors from enforcing any rights given them by French law against the French debt, which must be treated as being situate in France and subject to French law, so that the attachment, which alone was recognised by the law of France, ought to prevail over the debenture-holders.

Where there are special circumstances, as in this case, the Court has power, under its general jurisdiction, to restrain vexatious and oppressive litigation: *McHenry* v. *Lewis*. (3)

[Reference was also made to *Barraclough* v. *Brown* (4) and the Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113.)]

(1) [1900] 1 Ch. 602.
(2) (1867) L. R. 4 Eq. 62; (1868) L. R. 3 Ch. 479.
(3) (1882) 22 Ch. D. 397.
(4) [1897] A. C. 615.

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March 9. *H. E. Wright*, in support of the motion on behalf of the liquidator of the Manar Steamship Company, defendants. The action brought by the plaintiffs, the Northern Trust, Limited, against the defendant company, to obtain a declaration of the validity of the mortgage granted them by the defendant company, should be stayed as frivolous and vexatious. It is not a foreclosure action, nor an action to enforce a security, for they have enforced their security under their statutory power of sale, and the purchaser has a good title, so that the purchase cannot be impugned. It is true that it is open to the liquidator of the defendant company, should he deem it necessary, to bring an action at a future time against the plaintiffs for damages for the wrongful sale; and the sale may turn out to have been improper on the ground that the mortgage is invalid owing to the shareholders of the Manar Steamship Company not having passed in general meeting the resolution necessary under the articles of association to authorize the directors to borrow money; still, in that case, the liquidator will be plaintiff, and can select his own time for bringing the action. At the present moment, however, the liquidator has neither the evidence forthcoming nor the means to raise that issue, and it would be unfair to compel him now to enter upon substantial and complicated questions as to the validity of the mortgage. In support of this view, the reasoning in *Brooking* v. *Maudslay, Son & Field* (1) applies, where the action was by underwriters to restrain the holders from proceeding on a policy; but the Court declined to declare that there was no liability upon it, Stirling J. saying, "it is difficult to see why the defendants, having a claim which they may assert in a Court of law at any time within the period fixed by the Statute of Limitations, should be compelled to try the issue on which the validity of that claim depends in a Court of Equity, and at another time than that which they may select as the most convenient for themselves."

When the present action was commenced, the plaintiffs knew that the defendant company was in liquidation; and,

(1) 38 Ch. D. 636, at p. 645.

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subject to narrow exceptions of which this is not one, an action against a company in voluntary liquidation will be stayed: *Walker* v. *Banagher Distillery Co.* (1); *Rose* v. *Gardden Lodge Coal Co.* (2); *Freeman* v. *General Publishing Co.* (3)

[Reference was also made to *The Wexford* (4) and to *Austen* v. *Collins.* (5)]

*Scrutton, K.C.*, and *Balloch*, for the plaintiffs, the Northern Trust, Limited, in opposition to the motion by the defendants, Strachan Brothers. This action is properly brought to obtain a declaratory judgment of the rights of the parties according to English law, so as to assist the plaintiffs in the proceedings pending in France, where the defendants, Strachan Brothers, are attempting to deprive the plaintiffs of their property; in other words, it is necessary for the plaintiffs to have a judgment which can be made "executory" in France for the purpose of proving that the ship and freight are the property of the plaintiffs. It lies on the defendants to prove that such an action is vexatious: *Hyman* v. *Helm.* (6) The defendants, Strachan Brothers, were shareholders in the *Manar*, and William Dixon, the sole member of the firm of Strachan Brothers, moved the resolution for the borrowing of the money on mortgage of the *Manar*. He, therefore, had notice of the plaintiffs' mortgage before his firm supplied necessaries to the ship. For these stores Strachan Brothers have, according to English law, no maritime lien, and as creditors of the Manar Steamship Company they are postponed to the plaintiffs' mortgage so far as the ship is concerned. As regards the freight, the plaintiffs having taken possession of the vessel are, as mortgagees in possession, entitled to the freight. They also chartered her, and in the character of charterers are entitled to the freight, which became payable by the French consignees at St. Nazaire. The proceedings taken in France by the defendants are with a view to gain priority over the plaintiffs as mortgagees; but if a foreign Court, in defiance of the

(1) (1875) 1 Q. B. D. 129.
(2) (1878) 3 Q. B. D. 235.
(3) [1894] 2 Q. B. 380.
(4) (1887) 13 P. D. 10.
(5) (1886) 54 L. T. (N.S.) 903.
(6) (1883) 24 Ch. D. 531.

comity of nations, refuses to recognise a title properly acquired according to the law of England, this Court would not give effect to the decision: *Simpson* v. *Fogo* (1): see the reference to this case at p. 483 of *Liverpool Marine Credit Co.* v. *Hunter*. (2)

As to the second motion, the liquidator of the defendant company made no effort to stay the action of Strachan Brothers against him in the King's Bench Division, but allowed them to obtain judgment by default in England; and Strachan Brothers are now being allowed to try and satisfy their claim out of property in France, which they have arrested as assets belonging to the defendants, the Manar Steamship Company. It is, therefore, necessary for the plaintiffs to be in a position to prove in the French Court that the ship and freight belong to them, and not to the Manar Steamship Company; in other words, that Strachan Brothers must look elsewhere for the satisfaction of their claim. Secondly, the affidavit of the liquidator of the defendant company does not expressly deny the validity of the plaintiffs' mortgage; but, after allowing the plaintiffs to charter and subsequently sell the vessel, the liquidator now alleges that there are substantial and complicated questions to be determined with reference to the validity of the mortgage—that is to say, it is inferred that there is a blot on the plaintiffs' title as mortgagees. The plaintiffs are entitled to take steps to remove this if they can and perfect their security. They are not bound to have their property tied up, possibly for years, under the threat of future action by the liquidator, and, if necessary, the Court will allow the plaintiffs to amend their writ so as to claim an account and foreclosure. In this way their rights, as secured creditors of the Manor Steamship Company, will be determined once for all.

In all the cases cited on behalf of the defendants the liquidator admitted the right of the creditor to prove his debt in the liquidation proceedings, and, on that ground, the action was stayed.

[Reference was made to *In re Regent's Canal Ironworks Co.*,

(1) (1863) 1 H. & M. 195. (2) L. R. 3 Ch. 479.

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*Ex parte Grissell* (1); *In re David Lloyd & Co.* (2); Companies Act, 1862 (25 & 26 Vict. c. 89), s. 87; Buckley on the Companies Acts, 8th ed. p. 297.]

*Cur. adv. vult.*

March 16. BUCKNILL J. [The learned judge read the declarations claimed by the plaintiffs, and, after summarizing the facts already set out, continued:—] It has been argued in the first motion on behalf of the defendants, Strachan Brothers, that in the circumstances the proceedings instituted by the plaintiffs, the Northern Trust, Limited, cannot be of practical utility to them, that they amount to an improper interference with the proceedings in another country, and that they are in their nature oppressive and vexatious. With regard, however, to the first objection, I cannot rely on the affidavits of French lawyers which have been read in the course of the arguments addressed to me, for they do not make it clear what effect a judgment in this action would have on the proceedings in France. I must, therefore, treat the matter as open, and on consideration I do not find that it has been made out to my satisfaction that the declarations sought by the plaintiffs will not be of practical utility to them, nor am I able to say that this action is an improper interference with the proceedings in France; and the defendants have failed to satisfy me that the declaration asked for is oppressive or vexatious, or an abuse of the process of this Court.

The result is that I see no reason for staying the action, and, therefore, dismiss the first motion with costs.

The second motion is made on behalf of the liquidator of the Manar Steamship Company, Limited, for the purpose of staying an action by the same plaintiffs in which they claim a declaration similar to that in the action I have just dealt with. The facts, however, in this second case are different. Here the plaintiffs have attacked the steamship company, though that company has not shewn any desire to challenge the validity of the mortgage under which the vessel was taken possession of by the plaintiffs, or to challenge the right of

(1) (1875) 3 Ch. D. 411. (2) (1877) 6 Ch. D. 339.

the plaintiffs to the freight earned under the charterparty. It is true that the liquidator has alleged in his affidavit filed in this action that the mortgage on the ship may be invalid on the ground that "no valid resolution of the company was passed authorizing the borrowing of the sums" in question, and he adds that "there are substantial and complicated questions to be inquired into and determined before judgment can be properly given in this action; but there are no funds belonging to the company available for the defence of this action, in which no substantive relief is claimed against the company, and which is, I believe, brought against the company solely for the purpose of obtaining a declaration as to English law, to be used by the plaintiffs in certain proceedings in the French Courts." From that affidavit I gather that it is possible that the company, apparently without funds, and now in liquidation, and without any desire to litigate, may hereafter choose to claim, on behalf of those interested, a declaration that the mortgage is invalid; but this is not a case where the contract is alleged to be void; the allegation amounts to no more than this—that, within the time limited by law, the company may perhaps seek to set the mortgage aside. The plaintiffs, however, say that this question must be settled now; the liquidator, on the other hand, says that he is not bound to have his hand forced, and in support of that view a passage has been read from the judgment of Stirling J. in *Brooking* v. *Maudslay, Son & Field* (1), which appears to me to be in point. The plaintiffs at the present time are in the position of having lent a sum of money on mortgage, taken possession of the ship, chartered her and earned freight, whilst the defendants, the Manar Steamship Company, though aware of these proceedings, have not been antagonistic. The company has not attacked the plaintiffs, and until the plaintiffs were attacked by Strachan Brothers in France matters between the plaintiffs and the defendant company were at rest. After, however, Strachan Brothers had proceeded in France against the defendant company in respect of necessaries supplied to the ship of which the plaintiffs are mortgagees, but in which

(1) 38 Ch. D. 636, at p. 645.

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proceedings the defendant company did not appear, the Northern Trust, Limited, as plaintiffs, put the law in motion by the present proceedings against the defendant company for no other reason, so far as I can see, than to obtain a declaration for use in France in litigation to which the defendants, the Manar Steamship Company, have not made themselves parties. It seems to me, therefore, that this proceeding is oppressive and vexatious, and I direct that the plaintiffs' action be stayed—not dismissed—and that the costs be paid by the plaintiffs.

*First motion disallowed with costs; second motion allowed with costs.*

Solicitors for plaintiffs: *King, Wigg & Co., for George Armstrong & Sons, Newcastle-upon-Tyne.*

Solicitors for both defendants: *Pritchard & Sons, for Wilkinson & Marshall, Newcastle-upon-Tyne.*

T. L. M.

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*April* 3.

## THE EMILIE GALLINE.

*Admiralty—Salvage—Constructive Acceptance of Service.*

The defendants' barque with three tugs in attendance was lying moored outside the entrance to the Alexandra Dock at Hull waiting to enter, when a steamer coming out of the dock, owing to a rope fouling her propeller, was driven by wind and tide down on to the barque, which in turn was forced on to the Hebbles Sand. The two tugs in attendance on the steamer towed that vessel clear of the barque, and thereby the three tugs in attendance on the barque were enabled to pull that vessel off the sand. In a salvage suit commenced by the five tugs against the owners of the barque:—

*Held*, by Bucknill J., that the three tugs which were in attendance on the barque were entitled to salvage, as their services, for the time being, were outside their towage contract, but that the claim against the barque, made by the two tugs in attendance on the steamer, must be disallowed, as there was no evidence from which a constructive acceptance of their services by the master of the barque could be inferred within the principle laid down in *The Vandyck*, (1881) 7 P. D. 42; affirmed (1882) 5 Asp. M. L. C. 17.

ACTION OF SALVAGE.

The plaintiffs were the owners, masters, and crews of the

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undermentioned five steam-tugs; the defendants were the owners of the French barque *Emilie Galline*, her cargo and freight.

The facts were shortly as follows :—

The *Scotsman* is a screw-tug of 141 tons gross register, 60 horse power nominal, manned by a crew of 9 hands, and is of the value of 9000*l*. The *Humber* is an iron paddle-tug of 124 tons gross register, 45 horse power nominal, manned by a crew of 7 hands, and is of the value of 6000*l*. The *Powerful* is a paddle-tug of 88 tons gross register, 40 horse power nominal, manned by a crew of 5 hands, and is of the value of 2000*l*. The *Huntsman* is a screw-tug of 127 tons gross register, 70 horse power nominal, manned by a crew of 7 hands, and is of the value of 7000*l*. The *Stephen Gray* is a paddle-tug of 107 tons gross register, 165 horse power nominal, manned by a crew of 5 hands, and is of the value of 4000*l*.

The *Emilie Galline* is a steel barque, belonging to the port of Havre, of 2040 tons gross register, and was on a voyage from San Francisco to Hull with a cargo of 2547 tons of grain. Her value was 9750*l*., that of her cargo 13,429*l*., and freight at risk 3201*l*., together 26,380*l*.

On the morning of January 31, 1903, the *Emilie Galline* arrived in the Humber, and was towed up the river by the *Scotsman* and the *Humber*, which were engaged to take her into the Alexandra Dock. About 8.30 A.M. the *Emilie Galline* reached the dock, there being at the time a strong ebb tide running and a S.W. gale blowing. Under the direction of the dock master, she was safely moored head towards the dock on the east side of the entrance, with her two tugs in attendance, waiting her turn to enter the dock, and, on account of the strong wind, a third tug, the *Powerful*, was engaged to straighten the vessel when she should enter. About 10.30 A.M. the steamship *Gorjistan*, of 2093 tons register in water ballast, proceeded to come out of the dock in tow of the tug *Huntsman*, and with the *Stephen Gray* in attendance under contract. As the *Gorjistan* passed out of the lock, the stern check-rope parted and fouled her propeller, with the result that the wind and tide, in spite of the efforts of her two tugs, drove her down

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towards the *Emilie Galline*, and with her forward davit on the port side she fouled the jib-boom of that vessel, forcing the *Humber* and the *Powerful*, which were on the port quarter of the *Emilie Galline*, to cast off. The *Scotsman*, which was on the port side of the *Emilie Galline*, tried, under the orders of the pilot, to hold her up; but the *Gorjistan*, pressing down on the *Scotsman* and the *Emilie Galline*, forced them astern, damaging the bowsprit, rigging, stanchion, and rails on the forecastle head of the *Emilie Galline*, breaking some of her mooring ropes, and making her take the ground amidships on the East Hebbles Sand, the *Scotsman*, after sustaining some damage, getting clear by slipping her rope. The *Gorjistan* remained entangled with the *Emilie Galline* for upwards of three-quarters of an hour, when with the assistance of her tugs, the *Huntsman* and the *Stephen Gray*, she got clear.

The *Scotsman*, *Humber*, and *Powerful* then again made fast to the *Emilie Galline*, ropes at the same time being got out to hydraulic cranes, and, with the three tugs towing, the *Emilie Galline* was in about a quarter of an hour got off the sand, and about noon entered the lock.

By their statement of claim the plaintiffs alleged that, without the assistance of the *Huntsman* and the *Stephen Gray*, the *Gorjistan* could not have been taken away from the *Emilie Galline*, and that the latter vessel would have sustained much greater damage had they not succeeded in towing the steamer away, and so enabling the barque to be got off the ground. They further alleged that the *Scotsman* and the *Humber* were crushed and otherwise damaged, and that without the assistance of those two tugs, and the *Powerful*, the *Emilie Galline*, with a falling tide, would have remained stranded, and have sustained serious injury.

By their defence the defendants denied that the *Emilie Galline* was in any danger from the grounding on the Hebbles Sand, and contended that the services of the *Scotsman* and of the *Humber* were little more than towage within their towage agreement. They further alleged that no services were rendered by the *Huntsman* or the *Stephen Gray* to, or were required from them by, the *Emilie Galline*, as any services they per-

formed were rendered to the *Gorjistan*, which vessel they were bound to assist under their towage agreement.

April 3. *Aspinall*, *K.C.*, and *Lauriston Batten*, for the plaintiffs, the owners, masters, and crews of the five tugs. The services rendered by all five tugs to the *Emilie Galline* were difficult and dangerous, and saved that barque from much greater damage. The *Gorjistan*, with her propeller foul, was quite helpless, and, with her high broadside acted upon by the strong wind, there was a chance of very serious mischief happening to the *Emilie Galline* if the two vessels had remained entangled. From this danger the *Huntsman* and the *Stephen Gray* rescued the *Emilie Galline* by towing the *Gorjistan* away. These services were outside the contractual engagement binding the two tugs towards the steamer, and give rise to a salvage claim against the *Emilie Galline*, that vessel deriving a direct benefit from the action of the two tugs in towing the *Gorjistan* away from her. It is, therefore, immaterial whether there was any request or engagement by the master of the French barque, as, according to *The Vandyck* (1), following the principle laid down in the earlier case of *The Annapolis* (2), all that is necessary is that the services should be rendered at a time when a vessel is so circumstanced that a prudent man would accept them.

The three other tugs—*Scotsman*, *Powerful*, and *Humber*—saved the *Emilie Galline* from the almost certain risk of being severely strained or otherwise seriously damaged if she had remained longer aground with a falling tide, and during the time that the *Emilie Galline* and the *Gorjistan* were foul of one another the *Scotsman* and *Humber*, which were fast to the barque, were nipped and damaged.

*Laing*, *K.C.*, and *Stubbs*, for the defendants, the owners of the barque, her cargo and freight. The two tugs, *Huntsman* and *Stephen Gray*, were under contractual engagements to assist the *Gorjistan*. They were bound to do what they did do, that is, tow that vessel clear of the *Emilie Galline*. The master of the latter vessel did not, in fact, request them to tow

(1) 7 P. D. 42; affirmed 5 Asp. M. L. C. 17. (2) (1861) Lush. 355.

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the steamer clear, and no such request as was inferred in *The Vandyck* (1) can be inferred in the circumstances of this case, for the master of the *Emilie Galline* had in attendance a third tug, the *Powerful*, to assist his own vessel, and, had he been asked, he would have declined to accept the services of the two tugs, the *Huntsman* and the *Stephen Gray*, to do the work they were already engaged upon, and bound to do, that is, to assist the *Gorjistan* in her difficulties, and tow her clear of danger. No claim, therefore, arises for salvage services rendered to the French barque, though it may well be that, as against the *Gorjistan*, the two tugs are entitled to say that, assuming they were bound to continue to assist that vessel, they were not bound to do so on the contract terms: *The I. C. Potter* (2); but that question does not arise in this case.

As to the claim of the three other tugs—the *Scotsman*, the *Humber*, and the *Powerful*—no doubt two of them sustained some damage, which will be taken into consideration, and all three may be entitled to a moderate award of salvage; but, according to the evidence, the grounding of the *Emilie Galline* did not expose her to any real danger, as she could have lain on the sand for a tide or two, if necessary, without fear of straining.

*Aspinall, K.C.*, in reply.

BUCKNILL J. In this action salvage claims are made by five tugs—the *Scotsman*, the *Humber*, the *Powerful*, the *Huntsman*, and the *Stephen Gray*—and the question arises how many of them are entitled at law to salvage; and, secondly, how much is due to such of them as are so entitled. Now, the facts of the case are not difficult, and may be taken to be almost admitted, so far as they raise this question of law.

The barque *Emilie Galline* wanted to be docked in the Alexandra Dock, and she had two tugs in attendance on her under contract—the *Scotsman* and the *Humber*—and by accident, so far as those tugs are concerned, she eventually got aground on the East Hebbles. The way she got there was this. She had been brought up, in a gale of wind, to the

(1) 5 Asp. M. L. C. 17. (2) (1870) L. R. 3 A. & E. 292.

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entrance of the Alexandra Dock, where she had been properly made fast whilst waiting for certain vessels to come out of dock before she herself could go in. The first of those vessels passed out safely, but another vessel, the *Gorjistan*, a large steamer, was following the first steamer out, preceded by a tug —the *Huntsman*, which was made fast to her, and followed by the *Stephen Gray*, which was not fast to her—when by the negligence of somebody—not being the negligence of those on the *Huntsman* or the *Stephen Gray*, but by the negligence of some other person, either on the *Gorjistan* or on the dock-head —the *Gorjistan* got a rope foul of her propeller, with the result that she fouled the barque, and squeezed down upon the tug *Scotsman*, pinching or nipping her between herself (the *Gorjistan*) and the barque, and carrying away all the head lines by which the barque was made fast to the dock-head except one wire hawser. In that way the barque, the *Scotsman*, and the *Gorjistan* went down river until the barque was brought up by touching the ground, and those two ships, with the *Scotsman* in between them, remained in that position for about an hour, until the *Gorjistan* was towed free from the barque by the *Huntsman* and the *Stephen Gray*. Those two tugs are plaintiffs in this action, and the question is whether in law they are entitled to succeed.

Two cases have been cited in support of their claim. The first is *The Annapolis* (1), in which the Privy Council affirmed a decision of Dr. Lushington, and the other is the more recent case of *The Vandyck*. (2) Now, in neither of those cases are the facts the same as in this case. In the case of *The Vandyck* (2) the facts were shortly that the plaintiff tug, called the *Stormcock*, was lying alongside the Liverpool landing-stage when she saw two steamships in contact over on the Cheshire side of the river; that one of those vessels was at anchor, and the other was the *Vandyck*, which had driven down river until she got athwart the hawse of the other ship; that the vessels were grinding together, and, in consequence of the screw of the *Vandyck* being fouled, that vessel was powerless to get away by her own steam; that the

(1) Lush. 355. (2) 7 P. D. 42; on appeal 5 Asp. M. L. C. 17.

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*Stormcock* went across the river and, without any contract being made with the *Vandyck*, got hold of the other vessel and dragged her away. The question was whether the *Stormcock* was entitled to claim salvage from the *Vandyck*. The Court said "Yes" on the ground that any prudent man in the position of the master of the *Vandyck* would, if asked the question, have said in answer to it, "By all means get me away from this vessel as soon as you can," and the question I have to ask myself here is: Would the master of the *Emilie Galline*, as a reasonably prudent man, if he had been asked by the tugs *Huntsman* and *Stephen Gray*, or one of them, whether they should free the steamer from the barque, have said "Yes" or "No"? The evidence does not enable me to answer the question one way or the other. Therefore I have to look at the question from a broader point of view. Neither party has thought proper to ask the master the question—perhaps from excessive prudence. The position was this: He had two tugs in attendance on him, one of which was pinched and helpless and powerless, and the other, the *Humber*, was made fast to the port quarter, and I do not think she was in a position at that time or was strong enough herself to have taken the steamer away; but the master of the barque knew, or had reason to believe, that the *Huntsman* and the *Stephen Gray* were in attendance upon the steamer and were her tugs, bringing her out, and he knew that one was fast and he saw the other coming out. In the circumstances, is it more reasonable to come to the conclusion that the master would have said, "Let them tow her clear, they are in attendance upon her; let them do it; here I am aground," or is it more reasonable to suppose that, if asked the question, he would have said, "Yes, tow away, and you shall be entitled to a salvage award hereafter from me"? It is so near the line that I am puzzled to know what answer to give; but the answer I do give is that there is not sufficient evidence to justify me in coming to the conclusion that the master would have accepted the services of those tugs in the circumstances of the case, and that it is reasonable to draw the inference that he was satisfied that they would continue to tow at the ship to which they were con-

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tractually bound. I know of no case where the facts are exactly similar to this case; but I decide that those two tugs are not entitled to claim salvage from the *Emilie Galline*, and, therefore, the defendants are entitled to judgment against them.

With regard to the other tugs, the case is simple. According to the log the barque was considered to be in a precarious and critical position. (1) Her master was afraid that serious consequences might arise if he was not towed off, and a third tug, the *Powerful*, had been engaged to assist. The *Scotsman* did most of the work, and was the most powerful of the three tugs, but they all three did their work very well. The evidence of the master of the *Scotsman* was given with extreme fairness, without any attempt at exaggeration.

I cannot make a large award because the Elder Brethren advise me that, in their opinion, the barque was not in anything like serious danger, though she was in that danger which every vessel of her size is in when she finds herself aground, in a gale of wind, in a place where there is a strong tide running. The value is not large—26,380*l.*—and I award 650*l.* Of that sum I give the *Scotsman* 300*l.*, the *Humber* 250*l.*, and the *Powerful* 100*l.*

Solicitors for plaintiffs: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants: *Stokes & Stokes, for Hearfields & Lambert, Hull.*

(1) "Pendant ce temps, la marée continuait toujours à baisser et mon navire se trouvait dans une position très critique et menaçait en restant échoué d'être écrasé par le vapeur abordeur."—Extract from the log of the *Emilie Galline*.

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*March* 11, 12; *April* 8.

## THE KONING WILLEM I.

*Admiralty—Collision—Fog—Fog Signal forward of Beam—Duty to stop Engines—Regulations for Preventing Collisions at Sea*, 1897, *art.* 16—*Statutory Presumption of Fault—Foreign Vessel outside Limits of Territorial Jurisdiction—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4; *s.* 424.

A British and a Dutch steam vessel came into collision, during a dense fog, in the English Channel six miles off Dungeness. The owners of the British vessel admitted liability for an infringement of the collision regulations; but the owners of the Dutch vessel denied liability on the ground, inter alia, that though the whistle of the other vessel was heard forward of the beam, their vessel was going so slow, and the fog signal so far off, that their master thought it better to wait, before stopping his engines, until he heard the whistle again:—

*Held*, by Bucknill J., that the Dutch vessel was to blame for not stopping, which omission in fact contributed to the collision, and no circumstance had been shewn for disobeying the positive direction contained in the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, 1897, that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines. . . ."

The advantage—apart from the express provisions of the regulations—of stopping, owing to the difficulty of ascertaining at once with any degree of certainty the position of a fog signal, discussed.

*Query*, whether the statutory presumption of fault created by s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, in respect of the infringement of any of the collision regulations, will attach to a foreign vessel, beyond the limits of British territorial jurisdiction, in the absence of an Order in Council issued under s. 424, with the consent of the Government of the country to which the ship belongs, directing that, in addition to being bound by the collision regulations, the provisions of Part V. of the Act shall apply to vessels of that country as if they were British ships.

Action of damage by collision.

The plaintiffs were the owners of the *Bittern*; the defendants were the owners of the *Koning Willem I.*

The facts were shortly as follows:—

On April 13, 1902, about 4 A.M., the *Bittern*—a steel screw steamship of 881 tons gross register, from Manchester to Ghent, with a crew of seventeen hands, and laden with a general cargo—was in the English Channel about (as the Court found) six miles E.N.E. of Dungeness, the weather being calm with dense

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fog, and the tide ebb running to the N.E. with a force of about two knots. She was on a course E.N.E. magnetic, making about three knots with her engines working dead slow, and sounding the prolonged blasts on her whistle required by the regulations. In these circumstances the whistle of a vessel, which proved to be the *Koning Willem I.*—a Dutch screw steamship of 2849 tons net register, from Amsterdam to Southampton, with a crew of ninety-six hands, passengers, and a general cargo—was heard some distance off and about ahead. The *Bittern* gave a long blast in reply, and, on a second long blast being heard from the *Koning Willem I.*, which was assumed to be on the port bow, it was replied to by the *Bittern*, and her helm ported and then steadied. A third long blast was then heard, and again assumed to be on the port bow, and replied to, and the helm of the *Bittern* again ported. Immediately afterwards the masthead, and then the green light of the *Koning Willem I.* came into view bearing four or five points on the port bow of the *Bittern*, about two ships' lengths off. The engines of the *Bittern* were put full speed ahead, her helm hard-a-port, and a short blast sounded on her whistle; but, though the helm of the *Bittern* was at the last moment starboarded in order, if possible, to throw her quarter clear, the *Koning Willem I.* with her stem struck the *Bittern* on the port side in the way of the engine-room, doing the *Bittern* so much damage that she had to be put ashore to avoid sinking.

The owners of the *Bittern* charged the *Koning Willem I.* with bad look-out, excessive speed, and neglect to stop or ease her engines; but a charge that the *Koning Willem I.* improperly starboarded was found by the Court not to be proved, and a charge of not standing by was abandoned at the trial.

By their defence the owners of the *Koning Willem I.* alleged that, at the material time, she was on a course S.W. b. W. $\frac{5}{8}$ W. magnetic, making very little headway through the water, with her engines going dead slow, and her whistle sounded in accordance with the regulations; that those in charge of her, hearing whistles of steamships on the starboard bow, stopped the engines, and then heard the whistle of a vessel, which proved to be the *Bittern*, approaching on the starboard bow;

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that the masthead and red light of that vessel were soon afterwards seen close to about a point and a half on the starboard bow, whereupon the engines of the *Koning Willem I.* were put full speed astern, and her whistle blown three short blasts; but the collision occurred, occasioning some damage in respect of which her owners counter-claimed, and charged the *Bittern* with bad look-out, excessive speed, and improperly porting. At the trial they set up the further defence that, beyond the limits of British territorial jurisdiction, the statutory presumption of fault created by s. 419, sub-s. 4, of the Merchant Shipping Act, 1894 (1), did not attach to a foreign vessel in the absence of an Order in Council issued under s. 424 of the same Act (2) directing that, for the purpose of the application of the provisions of Part V. of the Act, the vessels belonging to the foreign country should be treated as if they were British ships—that is, as if within s. 418, sub-s. 2. (3)

March 11, 12. *Laing, K.C.*, and *Adair Roche*, for the plaintiffs, the owners of the *Bittern*. Admitting that the *Bittern* is to blame for a breach of art. 16 of the Regulations for Pre-

(1) 57 & 58 Vict. c. 60, s. 419, sub-s. 4: "Where in a case of collision it is proved to the Court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

(2) Sect. 424: "Whenever it is made to appear to Her Majesty in Council that the Government of any foreign country is willing that the collision regulations, or the provisions of this part of this Act relating thereto or otherwise relating to collisions, or any of those regulations or provisions should apply to the ships of that country when beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that those regulations and provisions shall, subject to any limitation of time, conditions, and qualifications contained in the order, apply to the ships of the said foreign country, whether within British jurisdiction or not, and that such ships shall, for the purpose of such regulations and provisions, be treated as if they were British ships."

(3) Sect. 418, sub-s. 2: "The collision regulations, together with the provisions of this part of this Act relating thereto, or otherwise relating to collisions, shall be observed by all foreign ships within British jurisdiction, and in any case arising in a British Court concerning matters arising within British jurisdiction foreign ships shall, so far as respects the collision regulations and the said provisions of this Act, be treated as if they were British ships."

venting Collisions at Sea, 1897, it is contended that the *Koning Willem I.* must also be found to blame under the same article for not stopping on "hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained."

She must also be found to blame for not reversing to deaden her way.

The provisions of art. 18 of the old regulations (1884) as to stopping and reversing, when there was risk of collision, were rigidly enforced: see *The Ceto* (1); *The Lancashire* (2); and the second paragraph of art. 16 of the present regulations specially applying to fog has also been repeatedly held to be imperative. In *The Star of New Zealand* (3) an attempt was made to shew that "the circumstances of the case" did not admit of stopping owing to the vessel carrying a quantity of dynamite stowed aft which rendered her dangerous to other vessels following her; but the argument did not prevail. In *The Rondane* (4) a steam vessel was held to blame for not stopping her engines and keeping them stopped when the whistle of another steamer was heard forward of her beam, and a reason given in the judgment is that those on board will then not only be able to hear better, but will be able to direct their attention to the sound. In *The Bernard Hall* (5) great stress was laid on the necessity for stopping owing to the extreme difficulty of knowing how far off a vessel is when a fog signal is heard forward of the beam, although the vessel hearing it may not herself be in a fog: see also *The Cathay* (6) and *The Oceanic.* (7)

*Pickford, K.C., Aspinall, K.C.,* and *R. B. D. Acland,* for the defendants, the owners of the *Koning Willem I.* The second paragraph of art. 16 did not apply, for the position of the *Bittern* was accurately ascertained within the meaning of the rule. The master of the *Koning Willem I.* thought that the *Bittern* was on his starboard bow, as in fact she was, and at such a distance that there was no risk of collision. This was confirmed by the second whistle, as up to that time the

(1) (1889) 14 App. Cas. 670.
(2) [1894] A. C. 1.
(3) *Shipping Gazette,* November 7, 1899.
(4) (1900) 9 Asp. M. L. C. 106.
(5) (1902) 9 Asp. M. L. C. 300.
(6) (1899) 9 Asp. M. L. C. 35.
(7) [1903] A. C. (not reported).

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*Bittern* was keeping her course. The concluding words of the paragraph are, "and then navigate with caution until danger of collision is over"—that is to say, there must be danger of collision for the necessity to arise for stopping the engines; but there was at that time no danger of collision, the vessels were in a position of safety, and, had it not been for the improper porting of the *Bittern*, there would have been no collision. To have reversed would have been to throw the head of the *Koning Willem I.* to starboard, that is, in the direction of the other vessel, and would, therefore, have been an imprudent step. In all the cases cited on the other side there was a distinct finding that the position of the other vessel was not ascertained, and, as there was danger of collision, the rule as to stopping applied.

The effect of the *Koning Willem I.* being a foreign vessel is that, if the collision occurred within British jurisdiction, then, under s. 418, sub-s. 2, of the Merchant Shipping Act, 1894, "the collision regulations, together with the provisions of this part of the Act relating thereto," that is, including the presumption of fault, created by s. 419, sub-s. 4, would be binding on the vessel; but it is submitted that the evidence shews that the collision occurred beyond the limits of British territorial jurisdiction, and, therefore, if the Court should find that the omission to stop did not in fact contribute to the collision, the vessel being foreign cannot be deemed to be in fault, as the conditions required by s. 424 have not been complied with, that is to say, though the Government of the Netherlands has consented to the collision regulations applying to the vessels of that country, there is no evidence that that Government "is willing that . . . . the provisions of this part of this Act . . . . should apply to the ships of that country when beyond the limits of British jurisdiction."

[Reference was made to *The Fanny M. Carvill* (1); *The Saxonia* (2); *Reg.* v. *Keyn* (*The Franconia*) (3); *The Magnet* (4); *Don* v. *Lippman* (5); Marsden's Collisions at Sea, 4th ed. pp. 70, 240.]

(1) (1875) 13 App. Cas. 455, n.
(2) (1862) Lush. 410.
(3) (1876) 2 Ex. D. 63.
(4) (1875) L. R. 4 A. & E. 417.
(5) (1837) 5 Cl. & F. 1; 47 R. R. 1.

*Laing, K.C.*, in reply. Assuming that, on hearing the first whistle, the master of the *Koning Willem I.* did guess right as to the position of the *Bittern*, still it was only a guess as to the bearing, and afforded him no certain information as to the distance or course of the other vessel. The position was not ascertained within the meaning of art. 16, so that he was not relieved from the necessity of obeying the imperative directions contained in the second paragraph as to stopping the "engines, and then navigate with caution until danger of collision is over." The master of the *Koning Willem I.* ought not only to have stopped, but to have reversed in time—in which case, though the *Bittern* improperly ported, she would have passed clear.

In practice s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, has always been applied to a foreign vessel whether within or without British jurisdiction, and the question will not arise if the Court finds that the collision occurred within the three mile limit, or that the breach of the rule in fact contributed to the collision. It is submitted that, in any event, the section will apply as it is addressed, not to the owner of the vessel, but "to the Court before whom the case is tried," that Court being directed to draw a certain inference on proof of the infringement of any of the collision regulations—that is to say, the inference to be drawn is part of the lex fori, and the owners of the *Koning Willem I.*, as defendants and counter-claimants, have submitted to the jurisdiction of the forum by issuing their writ in the action, which has been consolidated with that commenced by the owners of the *Bittern*.

*Cur. adv. vult.*

April 8. BUCKNILL J. The *Bittern* was bound up Channel. The *Koning Willem I.* was bound down Channel, and a dense fog prevailed. The evidence of the *Bittern* was that her engines were working at dead slow, making a speed of about three knots; that the regulation fog signals were being sounded; that the whistle of what afterwards turned out to be the *Koning Willem I.* was heard ahead, and slightly on the

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starboard bow, far off, and was answered at once by the *Bittern*, and was heard again, this time apparently on the port bow, about a point and a half, and nearer; that that signal was answered and the helm of the *Bittern* was ported about two and a half points, until her head came to E. ½ S., and then the helm was steadied and the engines still continued working at dead slow; that then the whistle of the *Koning Willem I.* was heard apparently about four and a half points on the port bow, and was answered, and the helm was ported a little more, just as the lights of the *Koning Willem I.* were seen four to five points on the port bow and two ships' lengths away. That short distance indicates the density of the fog. Then the evidence is that the helm was at once hard-a-ported, and an order was given to put the engines full speed ahead as the only possible chance of avoiding a collision; but the *Koning Willem I.* came on at considerable speed, and her stem struck the *Bittern* in the way of the engine-room, doing her such hurt that she had to be run ashore. The place where the collision occurred was, as I find as a fact, about six miles E.N.E. of Dungeness—that is, outside the territorial limit.

The evidence on behalf of the *Koning Willem I.* was that at about 1.30 A.M. she ran into a dense fog, and her engines were put at dead slow, and fog signals were regularly sounded, the vessel being stopped from time to time when other ships' whistles were heard, the position of which was not ascertained; that later on other whistles were heard, and in particular the whistles of two different ships about two or three points on the starboard bow, the positions of which were not then quite ascertained, and which were not ascertained until they were heard a second and a third time, and then they seemed to be broadening on the bow; that a whistle which turned out to be that of the *Bittern* was then heard a fourth time and seemed to be coming nearer, and the engines of the *Koning Willem I.* were at once stopped; that the whistle then seemed to be getting nearer ahead, and shortly afterwards the masthead and red lights of the *Bittern* were seen about one and a half point on the starboard bow, and the engines of the *Koning*

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*Willem I.* were at once reversed full speed, but the collision was inevitable.

I find as a fact that the ships were not port to port, as alleged by the plaintiffs, but that they were shortly before the collision starboard to starboard, as alleged by the *Koning Willem I.*, and I also find as a fact that the helm of the *Koning Willem I.* was not starboarded, as alleged. From the time of the *Bittern's* signals being first heard the helm of the *Koning Willem I.* was not altered, and she was kept on her course, which was about S.W. by W. westerly, magnetic. On the above facts it was admitted that the *Bittern* must be held to blame for disobeying art. 16 of the regulations.

The question remains whether the *Koning Willem I.* is also to blame. The reason given by her master for not stopping his engines when he first heard the whistle of the *Bittern*, or at the second or third whistle, was this—that his ship was going so slow and the signal seemed to be so far off that he thought it better to wait until he heard it again; and that so soon as he heard it more ahead, that is finer on the bow, he stopped his engines immediately. Not having ascertained the position of the *Bittern* when her signals were first heard, in my opinion the engines should have been stopped, apart altogether from art. 16, but certainly in accordance with that article. I think, and the Elder Brethren of the Trinity House who assist me agree, that it was in that weather impossible to have ascertained with any degree of certainty the position of the *Bittern*—that is, the bearing and distance of the *Bittern* from the *Koning Willem I.*—when her whistle was first heard, and the master of the *Koning Willem I.* admits as much himself. I think his duty was, clearly, to have stopped his engines then. With regard to what has been said about signals in a fog, I think I may usefully read part of a paragraph in art. 18 of the Channel Pilot, Part I., 9th ed.: "Sound is conveyed in a very capricious way through the atmosphere. Apart from wind, large areas of silence have been found in different directions and at different distances from the origin of a sound, even in clear weather. Therefore too much confidence should not be felt in hearing a fog signal."

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Now I will refer to the judgment of the President in the case of *The Bernard Hall* (1), the language of which I adopt. The learned President said: "The Elder Brethren point out that there would be extreme difficulty in knowing how far off the vessel would be in a fog, and therefore they do not think there was any such ascertainment as to justify the *Holyrood*"—in this case the *Koning Willem I.*—"in not complying with the clear terms of art. 16, by stopping her engines when she first heard the whistle of the *Bernard Hall*; and that it is impossible to say that it would not have been a material matter if she had done so." Each case must, no doubt, be considered on its own facts; and in this case I hold without doubt that the master of the *Koning Willem I.*, a man of great experience, should have grasped the fact that as it was impossible for him to locate with any certainty in that dense fog the bearing of the *Bittern* or her distance away, he should have stopped his engines on first hearing her whistle. Instead of that, he waited until he found that the whistles indicated danger, because he heard them drawing ahead, proving that the *Bittern* was crossing his bows. So, on this part of the case, there has been a breach of the second part of art. 16. As has been pointed out to me by the Elder Brethren, if you stop your engines you can hear better than you can when the noise of the engines and propeller is going on. If you stop your engines you lessen the danger and give yourself better information than if you go on with engines moving, as was done in this case; and it may be that if the master of the *Koning Willem I.* had stopped his engines when he first heard the whistles, which he thought were far off, he might have come to the conclusion that the whistles were nearer than he thought they were—and I suspect they were nearer. I think it was negligent navigation on his part not to have stopped his engines when he first heard the whistle of the *Bittern*, and to have waited so long as he did. But there is another matter to be considered in connection with the navigation of the *Koning Willem I.* Her engines were not reversed until the *Bittern* came into view about 150 yards off. The reason given by the master of the

(1) 9 Asp. M. L. C. 300.

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*Koning Willem I.* is that his way was already almost stopped; but that is a question of fact for my decision, and I find that it is not so. I cannot accept the statement that the engines of the *Koning Willem I.* were stopped five minutes before they were reversed, or that they were reversed for eighty seconds before the collision. The master was asked in cross-examination by counsel for the plaintiffs, "Have you not said before to-day that your engines were reversed three minutes before the collision?" and he said, "Yes, I have said so; but I find now, by experiments made since the collision, that I must have been wrong, and I prefer to say that the engines were reversed for eighty seconds." That looks very much as if he had made experiments to see how long it took, when the engines were working, as he calls it, dead slow, to take the way off the ship. He preferred to put it at eighty seconds. The engines were stopped when the *Bittern's* whistle was heard narrowing on the bow more than before, and very shortly before the masthead and red lights came into view. Before they were stopped it is said the engines were working at dead slow. That is a very important question of fact which I have to decide. I am not satisfied on the point. I do not like to say that the master of the *Koning Willem I.* was trying to mislead the Court—I do not think he was—but I think he must be mistaken. I have to examine the facts carefully, and I think they lead me to the conclusion that the vessel was not going dead slow when he said she was and when he probably thought she was. Take, for example, the entry in the engineer's log: "Steamed from 1.20 at slow because of fog. At times remained stopped." I know that in ships of this high class the logs and other documents are supposed to be kept with great care, and it is almost impossible to believe that if the engines had been working dead slow for so long a time it would not have been recorded in the log. The log speaks only of "slow" and "stopped." The damage done to the stem of the *Koning Willem I.*, which was driven in sixteen inches and set over to port, indicates in our opinion that that vessel had substantial headway. I find as a fact that both vessels had substantial headway upon them, and from the facts which I have found I come to the conclusion that the

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engines of the *Koning Willem I.* had not been worked at slow so long as the master thought they had, and were not reversed anything like eighty seconds before the collision.

The position, therefore, is this: The collision was in the first instance certainly caused or contributed to by the improper navigation of the *Bittern*—that is admitted; she not only broke art. 16, but her witnesses were not correct when they judged that the *Koning Willem I.* was on the port bow; in other words, the *Bittern* ported across the course of the *Koning Willem I.*, and the *Koning Willem I.* did not starboard across the course of the *Bittern*. The *Koning Willem I.*, in my own opinion, and in that of the Elder Brethren, distinctly contributed to the collision in two ways. First, by her master not stopping her engines when he ought to have stopped them in that dense fog with so many vessels about. Being in doubt, as he was on his own admission, he ought to have stopped his engines; and when he found shortly after, as he did find and as he admitted he found, that the other vessel was porting and that her whistle signals were narrowing on his bow, indicating to him a position of extreme danger—the position being then that a vessel which could only be seen at about 150 yards was porting across his course—he ought not only to have stopped his engines but to have reversed them. That is not only required by the rules, but is necessary for proper navigation. These findings of fact render it unnecessary for me to consider the point of law which was raised with regard to the application of s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, and the decree will be that both vessels are to blame.

Solicitors for plaintiffs, the owners of the *Bittern*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Koning Willem I.*: *Clarkson, Greenwell & Co.*

T. L. M.

## In the Goods of MEATYARD.

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*Feb.* 23.

*Administration—Will—Foreign Domicil—Grant to Foreign Administrators—Executors passed over—Practice.*

The Court will follow the grant of the foreign domicil, unless the administrators appointed by the foreign Court are, by the law and practice of this country, personally disqualified from taking a grant here.

Thus, where a testator died domiciled in Belgium, leaving a will and codicil in English form appointing executors, and also leaving a Belgian will, the Court made a grant of administration with all three documents annexed in favour of two persons who had been appointed administrators of the deceased's estate abroad, in accordance with the law of the domicil.

Motion for administration with will annexed.

The testator, William John Meatyard, described as "of 66, Rue du President, Brussels, in the kingdom of Belgium, gentleman," by his will dated September 20, 1898, which was in English form and attested by two clerks to a firm of London solicitors, revoked all former wills and testamentary dispositions theretofore made by him, and appointed John Robertson Keep and Henry John Lane, both of London, solicitors (thereinafter called his trustees), to be the executors and trustees of his said will, and, after giving a number of specific legacies, he devised and bequeathed all his real and personal estate in the United Kingdom of Great Britain and Ireland (not thereinbefore disposed of) to his trustees upon trust, at such time and manner as they should see fit, to sell, call in, and convert into money, and thereout to pay his testamentary expenses and debts in England, and the legacies bequeathed by his said will and the duties thereon, and the legacies bequeathed by any codicil to the said will, and to stand possessed of the said residuary trust moneys and the investments for the time being representing the same, in trust to pay or transfer the same to his wife Valaska Meatyard absolutely.

By a codicil dated August 17, 1899, also in English form and similarly executed and attested, the testator revoked one of the specific legacies bequeathed by his will, which in all other respects he confirmed.

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Between the execution of those two documents, namely, on March 6, 1899, the deceased executed in Brussels a will in Belgian form, dealing with his property in Belgium, and purporting to revoke (according to the exhibited translation) "all wills previous to the present."

The testator died in Belgium on July 11, 1900.

On March 27, 1901, by a judgment or order of the Court of first instance at Brussels, and on May 29, 1902, by a judgment of the Court of Appeal in Brussels, two Belgian notaries, Edouard Dubost and Léon Jacobs, were appointed receivers and entrusted with the administration of all the personal estate and effects of the said deceased, with the rights and powers (inter alia) of specially, as well in Belgium as in England, recovering, receiving, and delivering valid receipts for all property belonging to the community and the estate of the deceased, including all sums of money, stocks, shares, bonds and claims unsecured or secured by pledge or mortgage, all insurance policies, whether the titles or securities were registered in the name of the deceased or of his widow, of entering for the purposes of this administration all judicial actions, choosing and appointing in Belgium and in England all mandatories, and enforcing all judgments and decrees, and generally of doing all that should be useful and necessary to manage and administer the said property and affairs, with power of substitution.

On January 30, 1903, a summons was taken out before one of the Principal Probate Registrars on behalf of Mâitres Dubost and Jacobs, calling upon the English executors "to shew cause why letters of administration of the estate of the . . . . deceased with the English will and codicil . . . . together with the Belgian will annexed should not be granted" to them, as "having been appointed receivers and administrators of all the personal estate and effects of the said deceased by an order of the Civil Tribunal of first instance of Brussels, dated the 27th March, 1901, and an order of the Court of Appeal of Brussels, dated the 29th day of May, 1902, being the Courts of competent jurisdiction in the place of domicil of the said deceased."

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On February 13, 1903, the registrar refused to make an order, but reserved the costs of the summons to be dealt with by the judge on motion.

The present notice of motion was thereupon filed, and was substantially in the same terms as the summons.

*Priestley*, for the foreign administrators, moved for a grant of administration with the will annexed, and relied on *In the Goods of Earl* (1); *In the Goods of Briesemann.* (2)

*Bayford*, for the persons named as executors in the English will. The executors have the right to a grant, quite irrespective of the domicil of the testator. The question of domicil is not material here, upon this motion; but, if it were, there might be a very substantial dispute as to what the domicil of the testator really was. His domicil of origin was English. He went to Belgium when he was sixteen. In 1847 he married a Belgian lady, who left an only daughter. In 1884 he married an English lady, but continued to reside in Belgium. He carried on the business of a hotel proprietor in Belgium, and was resident there for the purpose of carrying on that business, but came over to England from time to time. He obtained an agency in Belgium for Bass & Co., and he was engaged in the business of that agency during the later years of his life. In 1897 he married his third wife, a German lady, who survives. He did not become naturalized, although, as far back as 1860, he did obtain a decree of the King of the Belgians authorizing him to become domiciled in Belgium. Letters of naturalization would not be absolute evidence of domicil, but the fact that he did not take them out is a strong point in considering the question of domicil.

[THE PRESIDENT. It is not at all cogent evidence, in my opinion.]

In September, 1898, he came to England and executed a will in English form, leaving his property in such a way as he would not be entitled to leave it according to Belgian law. That will dealt exclusively with property in this country, and nominated my clients as executors. He afterwards returned

(1) (1867) L. R. 1 P. & M. 450. (2) [1894] P. 260.

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to Belgium and executed a will, in accordance with Belgian law, by which he purported to revoke all former wills. In August, 1899, he again came to England and executed a codicil in English form, by which he purported to revoke one specific legacy of 100*l.* in his English will, and in all other respects he confirmed that will. That is a second very strong piece of evidence that he intended to retain his English domicil.

According to the Wills Act, 1861 (1), s. 2, all three of the testamentary papers left by the deceased are entitled to probate, and the executors named in the English will and codicil are entitled to take probate here, no matter whether the deceased was domiciled in Belgium or in England. The authorities cited on the other side were all cases of the exercise of discretion, under s. 73 of the Probate Act, 1857, which in terms applies only to cases where no executor has been appointed by the will, or where there is no executor within the United Kingdom who is willing and competent to take probate. Neither of these conditions applies to the present case.

[THE PRESIDENT. If the testator's domicil was Belgian, your clients may be "willing," but, according to the law of the domicil, they are not "competent" to take a grant.]

There have been several decisions both ways, on the point whether the Court here will follow the law of the foreign domicil, or will make a grant on such lines as it thinks fit: *In the Goods of H.R.H. the Duchess of Orleans* (2); *In the Goods of Cosnahan* (3) (another case under s. 73, which does not apply in the present instance); *In the Goods of Von Linden.* (4) The wishes of a testator are to be followed as far as possible; and the right inference here is that this testator intended the English executors to deal with his pro-

(1) 24 & 25 Vict. c. 114, s. 2: "Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death), shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the law for the time being in force in that part of the United Kingdom where the same is made."

(2) (1859) 1 Sw. & Tr. 253.

(3) (1866) L. R. 1 P. & M. 183.

(4) [1896] P. 148.

perty in England, and the Belgian officials to deal with his property in Belgium.

*Priestley*, in reply.

JEUNE P. (after finding as a fact that the deceased was domiciled in Belgium). I think this case is concluded by the evidence before me of the Belgian law, which, for this purpose, I must assume to be accurate.

Taking that to be the law, it is clear that, according to the law of Belgium, this appointment of executors in the will made in English form is not one that the Belgian Courts would accept and act upon. The duty of this Court is to follow, so far as it can, the law of the testator's domicil, namely, the law of Belgium, by recognising the persons whom the Belgian Court has invested with the power and duties of administrators. This is in accord with more than one authority, the strongest of which is, perhaps, *In the Goods of Earl* (1), in which Lord Penzance had before him a very similar case; and the principle there laid down is that this Court ought to act in accordance with the law of the testator's domicil.

The same principle appears to have been recognised by me in *In the Goods of Briesemann* (2), in deciding which I said that "regard should be had to the law of the domicil, in order to determine what power or authority has been vested in any one with regard to dealing with the estate, and then to give such a grant to such person as will enable him to perform in this country the duties imposed on him." In such cases as this, it sometimes happens that the Courts of this country are obliged to mould the English law according to the principles which the foreign law—the law of the testator's domicil—has recognised as applicable to the particular case. That is done because this Court desires to follow as closely as it can the law of the deceased's domicil. This principle explains the decision in the case of *H.R.H. the Duchess of Orleans*. (3) This Court cannot follow the foreign law so far as to grant administration to any one who is personally disqualified from taking the grant.

(1) L. R. 1 P. & M. 450. (2) [1894] P. 260, at p. 261.
(3) 1 Sw. & Tr. 253.

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For instance, however much the foreign Courts may think that a minor should have the grant, this Court cannot go so far as to give it to such a person. But that has no application in the present case, where no question of personal incompetence arises in regard to the persons who have been recognised by the Belgian Court. For this Court to insist on appointing the executors named in this testator's will would be to fly in the face of the law of the testator's domicil; and that is what this Court never does if it can avoid it. The case of *In the Goods of Cosnahan* (1), in which the grant was made under s. 73, does not apply. I do not feel any difficulty in applying s. 73, because there is, in this case, according to the law of the testator's domicil, no competent executor—"competent" not being, in my view, limited to the case of personal competence, but extending to a case where, according to the law of the testator's domicil, the testator was not entitled to nominate a person as executor.

I am of opinion, therefore, that the two persons who have been recognised as entitled to administration by the law of Belgium should be given the powers of full administrators as nearly as the law of the domicil would give it to them. I make an order for a grant of administration with these three documents annexed, the two Belgian gentlemen to administer the estate of the deceased according to law—that is, according to the method that we should consider proper: and that will probably be according to the law of the domicil. The costs of this motion and of the summons before the registrar should be paid out of the estate.

Solicitors for Belgian administrators: *Michael Abrahams, Sons & Co.*

Solicitors for English executors: *Rowe & Maw.*

(1) L. R. 1 P. & M. 183.

H. D. G.

## EYRE *v.* EYRE (BOOKER AND EYRE INTERVENING).

1903
*March* 6, 13.

*Will and Codicils—Incorporation.*

The testator made a will in 1894, and a holograph codicil in 1898, both duly executed and attested.

The will of 1894 had been settled by his conveyancing counsel, whom he had known for many years, and who had transacted much of his private business.

In 1902 a codicil was drawn by a confidential clerk of the testator to what the clerk believed to be the last will of the deceased, the testator having vouched that he had executed a will, though without giving any date; and the clerk, assuming that such a will had been executed, based it on an incomplete draft handed to him by the deceased.

This codicil was duly executed and attested, the testator saying, "This is a codicil to my last will." It carried out his wishes, so far as it went; but some points, as to which the testator was still undecided, were left over for further consideration. The testator died shortly after executing this codicil:—

*Held*, that the will of 1894, the codicil thereto of 1898, and the document executed as a codicil in 1902, were all to be admitted to probate.

THIS was a probate suit arising out of the testamentary papers left by George Lewis Phipps Eyre, late of No. 1, John Street, Bedford Row, who died on February 23, 1902.

The facts sufficiently appear from the judgment.

*Asquith, K.C.*, *Bargrave Deane, K.C.*, and *Priestley, K.C.*, for the plaintiffs.

*Dickens, K.C.*, and *R. H. Pritchard*, for the defendant.

*A. Powell, K.C.*, and *Barnard*, for the first intervener.

*Le Bas*, for the second intervener.

*Cur. adv. vult.*

March 31. BUCKNILL J. In this case the plaintiffs, who sue as executors of George Lewis Phipps Eyre, deceased, claim to have admitted to probate two documents, being respectively a draft will of 1897, described as document "A" in the pleadings, and a codicil dated February 20, 1902, described as document "B." The claim of the plaintiffs is put

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alternatively: Firstly, that the document referred to in the codicil of February 20, 1902, as the last will of the deceased was in existence at the time when the deceased executed the codicil, and was never revoked by him, but has been been lost, and that its contents appear in the document "A." Secondly, and alternatively, that the document "A" was itself the document referred to in the said codicil, and was thereby incorporated and confirmed, and that the two together are the last will of the deceased.

The defendant, Emily Blanche Graham Eyre, by her counterclaim sets up a will of the deceased dated February 10, 1894, and a codicil thereto dated January 29, 1898, and the said codicil of February 20, 1902.

Constance Emma Sophia Booker, one of the testator's married daughters, an intervener, also claims to set up the will of 1894 and the codicil of 1898, but not the codicil of February 20, 1902; and another intervener, Charles Lewis Eyre, the heir-at-law of the deceased, claims a declaration that he died intestate.

The facts, so far as they are material to the issues raised in this litigation, are as follows:—

The deceased person, George Lewis Phipps Eyre, made a will dated February 10, 1894, which was duly executed and attested; and on January 29, 1898, he made a codicil to that will, which was also duly executed and attested. This codicil was quite short, and consisted of an appointment of two persons as executors and trustees of his will in the place of those whom he had previously appointed. That codicil was entirely in the handwriting of the deceased. The will of 1894 had been settled by his conveyancing counsel, Mr. Peck, whom the deceased had known for many years, and who had done much of his private business for him.

The first draft of that will was resettled by Mr. Peck after consultation with the deceased, and was afterwards finally settled, engrossed in due course, and executed and attested. On February 4, 1897, the deceased having drawn instructions for another will, Mr. Peck, to whom the draft was submitted, settled a will based on those instructions, and subscribed it

thus: "I have settled this draft, and do approve thereof subject to the marginal notes."

Although Mr. Peck met the deceased on many subsequent occasions on professional matters, this draft was never again referred to, nor did the deceased mention to him again the subject of his testamentary dispositions. That draft Mr. Peck never saw again until February, 1902, a few days before the testator's death, when it was brought to him by a witness, to whose evidence I shall now refer.

On February 3, 1902, James Macguire, managing clerk to the firm of solicitors of which the deceased was the senior partner, and the confidential clerk of the deceased, was called to his employer's private residence, and was told by him that he wished to consult him about his will. This was the first time he had taken Macguire into his confidence on the subject, although he had often consulted him about other private matters. When Macguire called, the deceased was in bed, with several documents by his side; he then handed to Macguire the papers known in this case as script "A," or the draft will dated 1897, and said, "This is the draft of my will; I want to know whether I have executed my powers under my marriage settlement to the fullest extent." He then asked Macguire to take the draft and consider it.

At that time his daughter Constance was married, and it is said that her marriage was against her father's wish. The date of her marriage was August, 1898, that is, after the codicil of January 29, 1898; and on February 3, 1902, the deceased told Macguire of his anxiety that the husband of the daughter Constance should take no benefit in her share under the will.

Another married daughter, Mrs. Tanner, had died between the date of the codicil of 1898 and February 3, 1902, but her name was not then mentioned. Macguire took away the draft will, and, having carefully considered it, went on February 13 to see the deceased, to discuss it with him; but he was too unwell to attend to business, and an appointment was made for the next day. On Macguire's inspection of the draft between February 3 and 13, he saw that it was a very incomplete document. It bore no date except the year 1897; the attestation

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clause was incomplete; it had a number of marginal notes, some by Mr. Peck and some in the handwriting of the deceased; his daughter Constance was still referred to by her maiden name, and Mrs. Tanner was mentioned as if she was still alive; the age of a child called Millicent Aileen Moore had been altered in the deceased's handwriting in such a way as to shew that he had made the alteration so lately as in 1900. There were blank places where sums of money should have been inserted. The word "out" in the handwriting of the deceased was found in the margin in several places, referring beyond doubt to parts of the draft that he at some time intended to alter, and reference was made by him in the draft to some notes which he had made on another paper. In fact, the document was in such a condition when Macguire first went through it alone that he concluded at once it was no more than an incomplete draft, and on February 14 he told the deceased so. The reply of the deceased was that he had executed a will, by which Macguire understood that a will duly executed was then, or had been, in existence, of which the draft in question was the basis; so, to use his own expression, he dropped the subject as the deceased was a very masterful man, and he accepted his statement that there was such a will, and that the deceased wished by a codicil to alter some of its provisions if so advised. The draft of 1897 was then discussed, not point by point exactly, but on those parts of it about which the deceased wished to speak, and he then asked Macguire to see Mr. Peck and take his opinion on any points on which he (Macguire) was doubtful. The interview then ended. Mr. Peck was consulted on the 18th, and he wrote an opinion on the 19th, which Macguire took at once to the deceased and read to him and asked him if he wished to act on it, and he said he did. The same draft was then gone through again, and each point of importance was discussed, Macguire taking notes on the back of Mr. Peck's opinion; but some of the points discussed were not settled and remained open. On February 20 Macguire called again, but the deceased was too ill to attend to the matter; and, from a statement made by the nurse who was in attendance on him, Macguire went to his

own house and then and there drew a codicil to what he believed to be the last will of the deceased—that is, he drew a codicil to a document the existence of which the deceased had vouched, and which Macguire assumed was a will based on the draft which he and the deceased had examined and discussed on February 3 and 19. If such a will ever existed, it is almost impossible to suppose that the draft which Macguire saw, in the condition in which he saw it, could have been a copy of it. About 10 o'clock on that night Macguire saw the testator again, and told him he had prepared a codicil to his will, and read it through to him, and the testator then said that it expressed his wishes. Macguire then suggested that the deceased should execute the draft forthwith, and that when he had made up his mind on those points about which he was still undecided he could have it re-engrossed and executed as a complete codicil. The deceased asked why he should execute it then, saying that there was no hurry; but Macguire made some remark about the shortness of life, whereupon the old man drew himself on to his elbow and executed the codicil, saying, "This is a codicil to my last will." Macguire and the nurse then attested it.

I have already said that the codicil was drawn up and executed in peculiar circumstances, and I have my own view as to the wisdom of the course which Macguire pursued on that day; and, although I am convinced that he acted as a perfectly honourable and straightforward gentleman, I must say that I should not, in the circumstances, have acted exactly as he did.

After the codicil was executed and attested the testator put it under his pillow, and Macguire left and went home and wrote out a short statement of what had occurred. On February 23 the testator died. At the trial it was admitted that he was of sound mind at the time of the execution of the codicil. Of the language of the codicil it is only necessary to make one remark: not knowing the date of the will of which the draft of 1897 was taken by Macguire to be the basis, because the draft itself had no precise date, the codicil made reference only to a last will of the testator; and, whenever

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reference is made in it to a will, the only will referred to was that which Macguire believed to be in existence, and of which he had accepted this draft of 1897 as the basis. He stated, in answer to a question of counsel for the defendants, that the codicil which he drew was intended to be a codicil to a will he had not seen; and he added that it was so intended by the testator beyond a doubt. It was also admitted by Macguire that it was never the intention of the testator that a fresh will should be drawn; also, so far as he was able to gather from the conversations he had with the testator, he had no intention of the draft of 1897 being set up as a will by the codicil. Both of them had in their minds another document. Two questions and answers in Mr. Powell's cross-examination of Macguire make this clear: "(*Q.*) So far as you could gather from your conversation with him, he had no intention of setting up this draft as a will, because there was already a will according to him?—(*A.*) Yes. (*Q.*) That being so, you did not trouble about all the doubts and queries there were expressed upon this draft; neither did he?—(*A.*) That is just it. I considered there was a will, certainly."

On the facts of this case, so far as I am able to judge, I find myself obliged to come to the conclusion that there never existed either a valid or an invalid will based on the draft of 1897. Except the statement made by the deceased on February 14, all the facts go to disprove its existence. The fact that Mr. Peck only settled the one incomplete draft, and that his queries on it were never answered, and that he never had the subject mentioned to him again by the testator, although he saw him afterwards on many occasions on professional business; the condition of the draft of February 3, 1902; the absence of any evidence of the engrossment of such a will and the failure to find it: all these matters go to satisfy me that the testator never went further than (using an expression of counsel) to tinker at this draft from time to time and over a long period. He had evidently an idea in 1897 of making such a will; but in 1898 he made a codicil in his own hand, which is some evidence that he had either changed his mind about a new will or that he had the subject

still under consideration. It is most probable that, when he told Macguire on February 14 that he had executed such a will, he believed it, but the conclusion to which I come is that his memory played him false. He was of a great age; his bodily health was failing, and, perhaps, to a certain extent, his memory also, although, for the purposes of a testamentary disposition, it is not denied that his intellect was clear and good.

This draft had been in existence for nearly five years; and it bears on its face, as I have already said, traces of having been considered and altered so lately as in 1900.

It is, of course, possible that the deceased had made a valid will subsequently to the codicil of 1898 and based on the draft of 1897, and that some of the alterations now appearing on that draft of 1897 were made at a still later period than the will itself; but there is no evidence on this point. It is all in the dark.

I cannot accept the statement of the deceased to Macguire that there ever was a duly executed will, such as that of which he spoke.

In the case of *Atkinson* v. *Morris* (1) Lord Russell of Killowen stated the rule very clearly. He said: "There is no case to be found which goes the length of saying that statements made by a testator, to the effect that he has executed a will, are admissible evidence in substitution for the proper and regular evidence of the fact of the execution of the will conformably to and with the formalities enjoined by the Wills Act." As I cannot accept the statement of the deceased to Macguire that he had duly executed such a will, because it is not evidence, I cannot accept the draft of 1897 as a copy of a supposed will that is said, but not proved, to have been lost.

I now proceed to consider the codicil of February 19, 1902, drafted by Macguire in somewhat exceptional circumstances, and duly signed by the testator, and attested by Macguire and the nurse late at night on the same day and within a few hours of its preparation, and when the deceased was extremely ill. It recites the death of the testator's daughter Lucy Tanner

(1) [1897] P. 40, 48.

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and the marriage of his daughter Constance since the date of his last will. The deceased then proceeds to exercise a power of appointment under his first marriage settlement in favour of the children of his said deceased daughter, taking care to provide that, in the event of any part of the provision so made for the children of Mrs. Tanner coming eventually to his daughter Constance Booker or Emily Blanche Graham Eyre, it should be held upon the trusts under the will of the testator to which the codicil was supposed to make reference—that is, the will based on the draft of 1897. The words in the codicil, "upon the trusts under my will," are inapplicable to the will of 1894. They referred to a will supposed to be based on the draft of 1897, because Maguire, who drafted the codicil, had not heard of any other will.

The testator then revoked a legacy of 100*l.* and a bequest of a carriage clock given by his said will to his daughter Constance; and, in lieu thereof, left her a legacy of 25*l.*; and he then proceeded to deal with the share of his residuary estate by his said will given to or in trust for his daughter Constance, and in language which it is said could not refer to the will of 1894, but which did refer to the supposed will of which the draft of 1897 is said to be the basis. If that is so, can this codicil stand as a valid testamentary paper? The question must be answered before the alternative claim of the plaintiffs can be established.

In my judgment, it is not for me to say now that, because I cannot read the whole codicil with the will of 1894, the codicil may not have an independent existence. As Lord Penzance said in the case of *In the Goods of Turner* (1): "It is said there is a difficulty in this case, because, by reason of the will having been destroyed, the codicil in great part is unintelligible. It seems to me that difficulty has no bearing upon the question whether this codicil shall be admitted to probate. The same difficulty applies in every case where some other document is mentioned in a will in such a manner that the directions of the will cannot be carried out without a reference to such document, and that document is not forthcoming. It is a

(1) (1872) L. R. 2 P. & M. 403, 406.

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question of construction which another Court only can decide.' I am of opinion that this codicil of February 20, 1902, which has been made in every way conformably to the statutory requirements, must be admitted to probate.

It being a valid testamentary document, the next question is whether the draft of 1897 (script "A") can be read into that codicil, so as to give effect to what is said to have been the intention of the testator. In my opinion, it is not competent to me to do so. As I have already said, the evidence compels me to find that both Macguire and the deceased referred to a will—not a draft will—and certainly not to an incomplete draft, such as is this so-called draft of 1897.

The testator looked on the codicil of February 20, 1902, as a codicil to an existing will; but I have no doubt that if Macguire had known then, what I hold now to be the real state of the facts—that is, that there was no proof that the testator had executed such a will, or, that there was never any other testamentary paper than the draft of 1897, except the will of 1894 and the codicil of 1898—he would have taken care that the codicil was properly worded, so that the draft of 1897 should have been incorporated; provided, of course, that he satisfied himself that such was the wish of the deceased.

It is said on the plaintiffs' behalf that *In the Goods of Mercer* (1) is in point. There, the deceased had executed a will dated November 7, 1865, which he left deposited at a bank in India. On August 21, 1869, being in this country, he executed a codicil to his "last will dated 7 November, 1865," and which he confirmed except in so far as altered by the codicil. He told one of his executors that his last will was deposited at the bank in India, and he gave him a copy of it, which he said was correct; and at the foot of that copy he wrote: "This is a copy of my last will and testament referred to in the codicil signed by me, this 19 August, 1869." In fact, no codicil was executed by the deceased on that date, and the copy of the will was not duly executed. Lord Penzance found there was such a will in India and that there was a copy of it, although not duly executed; but he also found

(1) (1870) L. R. 2 P. & M. 91.

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Bucknill J.

that the codicil referred to and confirmed the copy of the will, and he therefore granted probate of it, as incorporated in the codicil. That case is not like this. There, the Court found that there was a will in existence when the codicil was made; and it also found that the alleged copy of the will was in fact a copy; but here, I find that there was no will, and I also find that this draft is not even proved to be a copy of what the testator said was a will based upon it.

In *In the Goods of Elizabeth Watkins* (1) Sir J. P. Wilde said: "Before this motion can be granted, two propositions must be established, neither of which can be established in this case. First, it must be made manifest that the testatrix, in the executed paper, referred to some papers then in existence; and next, that the papers in question are beyond all doubt the papers referred to."

In my judgment the plaintiffs' claim fails.

I now come to the counter-claim of the defendant, who seeks by it to set up the will of February 10, 1894, and the codicil thereto of January 29, 1898, and the codicil of February 20, 1902. That will and those codicils were duly executed and attested and were never revoked. There is no doubt that the testator never intended to revoke the last codicil; and, as to the codicil of 1898 and the will of 1894, there is no evidence of revocation, except as appears in the draft of 1897, with which I have already dealt, and the statement by the testator that he had executed a will based on that draft: this point I have also dealt with.

The result of this litigation is that I declare in favour of the will of 1894, the codicil of 1898, and the further codicil of 1902. The costs of all parties should come out of the estate.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*

Solicitors for defendant: *Ingle, Holmes & Sons.*

Solicitor for intervener (Constance E. S. Booker): *Thomas Durant.*

Solicitors for intervener (Charles Lewis Eyre): *Minet, Pering, Smith & Co.*

(1) (1865) L. R. 1 P. & M. 19, 20.

H. D. G.

## GORDON *v.* GORDON AND GRANVILLE GORDON.

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*March* 10, 12.

*Divorce—Custody of Child—Paternity—Evidence.*

In the case of a child born in wedlock, as to whose paternity questions are raised upon an application as to the child's custody, if the husband could, from circumstances of time, place, and health, have had nuptial intercourse with his wife, the mother of the child, and it be not proved that he did not have such intercourse, he must be considered the father of her child, even if she were shewn to have committed adultery with any number of men.

Sexual intercourse between man and wife must be presumed, and nothing except evidence that the husband did not have such intercourse at the period of conception can bastardize a child born in wedlock.

Upon the authority of *Favard* v. *Favard*, (1896) 75 L. T. 664, a writ of attachment and a committal order were directed to be issued, upon the ex parte application of the petitioner, against the respondent, who had taken the child out of the jurisdiction.

SUMMONS as to custody of child, adjourned into Court for hearing.

On November 25, 1901, a decree nisi was pronounced, dissolving the marriage between the petitioner, Christian Frederick Gordon, and the respondent, Margaret Gordon (formerly Mrs. Close), on the ground of the respondent's adultery with the co-respondent, Lord Granville A. Gordon. At the same time an order was made giving the custody of the only child of the marriage (a young girl) to the petitioner, and directing the respondent to deliver up the child to the petitioner.

The decree was made absolute on June 2, 1902, and on August 5, 1902, the respondent and co-respondent were married at the British Consulate, Dieppe.

Subsequently the respondent took out a summons to vary the order as to custody, on the ground that before the petition was filed an agreement had been arrived at between herself and the petitioner that the child should remain with her; and, further, that it was for the benefit of the child that it should remain with the respondent. It was also alleged by

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the respondent that the child's father was the co-respondent, and not the petitioner.

The petitioner denied all these allegations, and asked the Court to enforce the order as to custody and delivery up of the child.

*Duke, K.C.*, and *Priestley, K.C.*, for the petitioner.

*Bargrave Deane, K.C.*, *Rufus Isaacs, K.C.*, *Barnard*, and *Willock*, for the respondent.

The case was before the Court on eight days, judgment being delivered on March 10. In the result the summons was dismissed, and the respondent was ordered to give up the child to the petitioner forthwith.

In the course of his judgment,

THE PRESIDENT said:—The law says that what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration. That is, I think, a proposition of the utmost importance in such cases as this. It was recognised in the opinion of the judges who were called in to assist the House of Lords in the *Banbury Peerage Case*. (1) In *Cope* v. *Cope* (2) Alderson B., in summing up, said: "If once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shewn that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father." (See also *Bury* v. *Phillpot* (3), per Sir John Leach M.R., and *Reg.* v. *Inhabitants of Mansfield* (4), per Lord Denman C.J.)

(1) (1811) 1 S. & S. 153, at p. 159; 24 R. R. 159.

(2) (1833) 1 Moo. & Rob. 269; 42 R. R. 787.

(3) (1834) 2 My. & K. 349; 39 R. R. 221.

(4) (1841) 1 Q. B. 444; 55 R. R. 307.

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In the well-known text-book on bastardy, by Sir Harris Nicolas (1), the learned author, after commenting on certain cases, says this, and it appears to me to represent accurately the law on the subject: "Though widely different from the law in the year 1632, when the first Earl of Banbury died, and for more than a century afterwards, with respect to the nature and extent of evidence which is admissible to prove that the husband is not the father of his wife's child, still the *principle* upon which these opinions were founded is precisely that of the old law. Sexual intercourse between man and wife must be presumed, and *nothing, except evidence* that the husband *did not have such intercourse* at the period of conception, can illegitimize a child born in wedlock. If the husband could, from circumstances of time, place, and health, have had nuptial intercourse with his wife, and there be no evidence to prove that he did not have such intercourse, he must be considered the father of her child, even if she had committed adultery with one, two, or twenty other men."

March 12. *Priestley, K.C.*, moved ex parte for a writ of attachment or for an order for the committal of Lady Granville Gordon, the respondent, upon affidavits stating that she had left the country with the child.

[THE PRESIDENT. Ought this application to be made ex parte?]

Such an order was made ex parte in *Favard* v. *Favard*. (2)

[THE PRESIDENT. In this case there was an undertaking not to remove the child. An engagement such as that, when entered into and broken, justifies the Court in directing a writ of attachment to issue, and in making such an order ex parte upon the authority of the case cited. But committal stands on a different ground, does it not? "Forthwith" does not necessarily mean immediately; and has the respondent had notice of the order? My difficulty is that it is not at present shewn that the exact order has been disobeyed.]

The respondent has removed the child out of the jurisdiction

(1) A Treatise on the Law of Adulterine Bastardy by Sir Harris Nicolas (1836), at p. 186.

(2) 75 L. T. 664.

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of the Court with the full knowledge that the child ought not to be removed.

THE PRESIDENT. I think, on the whole, that there is a valid order, and that you may take both a writ of attachment and an order for committal.

Solicitors: *Lewis & Lewis; Upton & Britten.*

H. D. G.

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*April* 1, 2.

## D. *v.* D.
## D. *v.* D. AND G.

*Divorce—Practice—Consolidated Suits for Judicial Separation and Dissolution—Power to hear in Camerâ.*

The Court possesses inherent jurisdiction to order any case to be heard in camerâ.

In a suit for judicial separation by a wife, the particulars in which disclosed allegations of filthy practices, but in which no suggestion was made of sodomy or bestiality, the Court, notwithstanding the fact that with the wife's suit had been consolidated a suit by the husband for dissolution of the marriage on the ground of the wife's adultery with the co-respondent, ordered, with the consent of all the parties, that the case should be heard in camerâ by a judge sitting with a special jury.

THESE were suits by the wife for judicial separation on the ground of cruelty, and by the husband for divorce on the ground of adultery, which had been consolidated by order. The allegations by the wife included certain filthy practices. All the parties denied the charges made against them.

At the opening of the case Jeune P. said that, looking at the particulars of some of the charges of cruelty alleged by the wife, the details were obviously such as no self-respecting person would desire to hear. The suits being consolidated, and involving, therefore, on the husband's petition, a claim for dissolution of marriage, he had no power to clear the Court, but he appealed to all persons, not directly interested in the case, to leave before it was opened.

After an interval, during which a number of persons left the Court, Jeune P. said that he had never yet made such an

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appeal in vain, and he hoped that any persons still in Court, who were not directly interested in the case, would leave.

Several more persons then left the Court, and the case was opened and proceeded.

Later in the day, when the objectionable parts of the case had been dealt with, so far as the wife's evidence thereon was concerned, an intimation was conveyed to the newspaper reporters; and some of them, as well as some members of the public, were readmitted.

On the second day of the trial, at the sitting of the Court,

*Sir E. Clarke, K.C.* (*Bankes, K.C.*, and *Barnard* with him), applied that the rest of the case should be heard in camerâ. The justification for making the application was, he said, that cases involving questions of sodomy were so heard by the Court.

[JEUNE P. That is not so, I think; and this is not a case of that sort.]

It is almost impossible for counsel to discuss, in a public Court, cases involving acts such as are alleged in these particulars. If this had been only a petition for judicial separation on the ground of the acts alleged here as cruelty, the Court would undoubtedly have power to order the case to be heard in camerâ. But it has been said by a former judge of this Court that, in suits for dissolution, the Court possesses no such power, and that the only cases where the Court possessed the power were in suits for nullity, under s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85); *C.* v. *C.* (1) The same learned judge who decided that case is believed to have expressed his own opinion that such cases as this ought to be heard in camerâ, and he did, in fact, so hear one well-known case.

[JEUNE P. But the learned judge in question thought he was then doing that which he had no power to do.]

Apart from questions arising from time to time in this Court, all Courts have an inherent right to hear cases in camerâ when they are of opinion that hearing them in that

(1) (1869) L. R. 1 P. & M. 640.

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way is conducive to the full and proper administration of justice. Only a few years ago, in the Chancery Division, a case which involved questions as to the conduct of a medical man in relation to a young woman was tried in private.

[JEUNE P. But was not the reason for hearing that case in camerâ because the very protection of wards of Court would be lost if such cases were heard in public? I remember, however, that there was a case, with regard to Sherborne School, that was heard by Denman J. in camerâ.]

Yes; that was done on the ground that it was not desirable that young men, who were to be called as witnesses in the case, should have their names published. In a case connected with a well-known patent article, the hearing was taken in camerâ. In that case a person in the employ of a certain firm had discovered the secret of the manufacture of the article in question, and, from that time forward, was said, in certain ways, to have endeavoured to bring improper pressure to bear on the proprietors of the patent. The action was brought to restrain him. The Divisional Court, before whom the case was argued, heard it in camerâ, and would not allow any mention of the names of the firms involved or of the article in question. That case went to the Court of Appeal, who also refused to allow any publication of those names.

[JEUNE P. That was on the same principle as in the case in the Chancery Division.]

Yes; but those cases shew that there is an inherent right in every Court to hear cases in private. In the present instance, the other parties to the suit consent; but the application is based on the higher ground that it is practically impossible to attain the ends of justice unless counsel are protected and assisted in the discharge of their duty by an order such as the Court is now urged to make.

[JEUNE P. In the old Ecclesiastical Courts, were cases of nullity heard in camerâ for the reason that those Courts considered that they possessed inherent jurisdiction to hear any cases in that way?]

There is no authority to shew that the power was specifically limited to suits for nullity.

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*Bargrave Deane, K.C.* (*Priestley, K.C.*, and *V. Russell* with him), for the wife, supported the application. He had attempted to get the Court to make such an order at the beginning of the case, but the Court then thought that previous decisions shewed that there was no power to make the order. In a case involving a charge against a man of misconduct towards his little daughter, Sir James Hannen ordered the Court to be cleared while evidence on that part of the case was being taken. Cases ought to be tried in the best possible way that is conducive to the attainment of the ends of justice. In the present case, there is the additional protection that the public are represented by a jury. There is nothing to shew on what grounds the old Ecclesiastical Courts heard suits for nullity of marriage in camerâ.

*R. H. Pritchard*, on behalf of the co-respondent, while supporting the application on principle, desired to state that there was nothing involved in the cross-suit of the husband against the wife which could possibly preclude the ordinary course of a public hearing.

JEUNE P. I am very glad that this application has been made to me, partly because the point raised is one which has pressed upon my mind in similar cases more than once, and over and over again I have felt the great difficulty there is in hearing these cases in public, not because the publication of the matters involved might be prejudicial to the morals of the public, because one may rely on the discretion of the press not to publish matters which would have that effect, but because one cannot try cases of this kind before the public.

I never felt so vividly as yesterday in this case the difficulty of dealing with a witness by handing up pieces of paper and not being able to press questions to the extent that they might be pressed because of details which no right-minded person would wish to press before a mixed audience of men and women.

What one has always felt is not the desirability or justice—of which I have had no doubt—but the mere legal difficulty of whether it can be done.

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On the whole, giving to the matter what consideration I can, I come to the conclusion that this Court has power to do what is now asked.

The application is based on two grounds, which run very closely into one another. One applies especially to this Court, and the other applies to all the Courts of justice in this realm.

In cases of dissolution of marriage, the power to try which in this Court is derived from the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), no power has been conferred by that statute to hear such cases in camerâ. But the practice of other Courts in this country should, in my opinion, be followed here.

In suits for judicial separation, this Court inherits the powers and practice of the old Ecclesiastical Courts, and there is no doubt that the old Ecclesiastical Courts did exercise the power of hearing suits for nullity in camerâ, and it is the practice of this Court to hear those suits in that way. I ask myself why that is so. It is quite true that those suits raise questions analogous to those raised in the present case, and which no one would desire to discuss in public. But I believe that the reason why the Ecclesiastical Courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity, but because, in the exercise of the general powers which those Courts possessed, they were of opinion that those suits ought not to be heard in public. In my view, they might have heard any suits in private; and I believe, having investigated this matter and inquired about it from persons of much greater experience and age than myself, I feel some confidence in saying that the Ecclesiastical Courts would have had power to hear in camerâ any case which, for reasons of decency, ought so to be heard.

If that is so, then this Court inherited those general powers, and in suits for judicial separation this Court has undoubtedly exercised its power to hear the evidence in camerâ.

In the present case I am prepared to accede to the argument addressed to me by Sir Edward Clarke, and to hold that this Court has power in suits for dissolution to hear the evidence in camerâ. If justice cannot properly be done by hearing a

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suit in public, the Court is justified and has power to hear it in camerâ.

Sir Edward Clarke has given me one or two instances in which, if the hearing of a case in public would frustrate the object of the suit, the Courts have determined that such case should be heard in private. That appears to apply to all suits, including the one now before me.

Wherever it is reasonably clear that justice cannot be done unless the case is heard in camerâ—it may be a patent case or a matter in Chancery relating to a ward of Court, or for the very reason that the investigation is practically impossible if the case is heard in public—then the Court, by reason of its inherent jurisdiction, has power to order that it be heard in private.

The present case comes under both heads. When the matter was first mentioned to me yesterday, I thought it would be possible to hear in camerâ that part of these consolidated suits which relates to a claim for judicial separation by the wife, and which does not affect the other part of the case—namely, the claim for dissolution.

But, having now heard the arguments addressed to me to-day, I have come to the conclusion that I can proceed on the general grounds also, and say that, with regard to the matters given in the particulars of the allegations in that part of these consolidated suits which relates to the wife's claim for judicial separation, the evidence shall be heard in camerâ. I will not exclude the public longer than necessary.

[The wife's petition was then proceeded with in camerâ.]

Solicitors for wife: *Cunliffes & Davenport.*
Solicitors for husband: *Druces & Atlee.*
Solicitors for co-respondent: *Chester & Co.*

H. D. G.

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*May* 4, 18.

## HOUGHTON *v.* HOUGHTON.

*Condonation — Adultery — Desertion — Revival — Decree of Dissolution of Marriage.*

Desertion for two years without reasonable excuse revives condoned adultery.

Where a husband was guilty of incestuous adultery, which was condoned by the wife, and he was afterwards guilty of desertion:—

*Held*, that the desertion revived the condoned adultery, and that the wife was entitled to a decree dissolving her marriage.

THIS was an undefended suit for dissolution of marriage.

Mary Jane Houghton, the petitioner, was married to David John Houghton in 1887, and lived with him at Dalston and other places, there being now living issue of the marriage one child only, David William Houghton, aged fourteen.

The petition alleged that the respondent had been guilty of incestuous adultery with the petitioner's sister (naming her) "on Sunday, the 21st day of October, 1888, at (an address given)," and at other times and places between June and October, 1888; and habitually, at the address named, in November and December, 1889.

The concluding paragraph of the petition alleged "that on the 3rd day of May, 1894, the said David John Houghton without reasonable excuse deserted your petitioner, and has not since returned to cohabitation with her."

It appeared that the respondent went to Canada in May, 1894, as he said, for eighteen months for the sake of his health. He corresponded with his wife, but never returned till 1902, when he came to England for a short time, but did not see his wife. He, however, wrote to the petitioner's mother, saying he would like to see the boy, and was told in answer that he could see him if he liked to come down, but he did not come.

On July 9, 1901, the husband obtained, in a Circuit Court held in the city of Detroit, in the State of Michigan, in the United States of America, a decree dissolving his marriage with his wife, and declaring the parties free from the obliga-

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tion thereof, upon the ground that the wife had been guilty of the several acts of desertion charged in his bill of complaint.

After the respondent left the petitioner, she carried on a tobacconist's business in Dalston until 1895, when she went to live with her parents for three years, and, at the end of that period, she took a situation as housekeeper. She had not taken proceedings before, owing, as she stated, to want of means, and friends were now assisting her with funds for this purpose.

The respondent was served in the United States of America, where he was still living.

The facts having been proved, counsel for the petitioner asked the Court to pronounce a decree nisi.

JEUNE P. You have first to satisfy me that the petitioner is entitled to more than a decree of judicial separation on the ground of desertion. The adultery has been condoned.

*Newson*, for the petitioner. Desertion revives adultery which has been condoned: *Cargill* v. *Cargill* (1); *Binney* v. *Binney* (2); Browne and Powles on Divorce, p. 87; *Palmer* v. *Palmer*. (3)

JEUNE P. *Cargill* v. *Cargill* (1) hardly seems to be an authority for your proposition, and certainly *Binney* v. *Binney* (2) is not a precedent for this case, for the condoned and revived adultery was with the same woman. Desertion was not a matrimonial offence before the Act of 1857 (20 & 21 Vict. c. 85), as was pointed out by the Judge Ordinary in the case just cited. Has desertion without cause for two years more effect than the Act specifically provides? Cruelty was always a matrimonial offence. The question you have to consider is: Did the Act make desertion a matrimonial offence for all purposes? The learned author of Browne and Powles on Divorce, pp. 87, 91, states that "the doctrine of condonation and revival will, it seems, apply to desertion" as well as to

(1) (1858) 1 Sw. & Tr. 235. (2) (1893) 69 L. T. 498.
(3) (1860) 29 L. J. (P. & M.) 124.

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The President.

any other matrimonial offences, and he cites *Binney* v. *Binney* (1) as an authority for that proposition; but, from the head-note and report of that case, I do not find that I said anything of the sort. You had better look further into the matter, and restore the case to the list for argument when you are ready.

May 18. *Newson* renewed the application for a decree nisi. Much less is required to destroy condonation than to found an original suit: *Cooke* v. *Cooke*. (2) Condonation is only conditional, and its continuing effect depends on the future good conduct of the party forgiven: *Dent* v. *Dent*. (3) The Judge Ordinary in summing up that case said (4): "Now the rule of law is, that all condonation is conditional, and the condition is, in future you shall treat me as a husband ought to treat his wife"; and, further on, in giving judgment (5): ". . . . if the condition on which the forgiveness is founded is broken, the effect of the forgiveness is taken away as if there had been no condonation at all." Even if desertion is a lesser offence than cruelty in the eye of the law, it should nevertheless be held to revive condoned adultery, upon the authority of the cases cited, and especially the decision in *Cooke* v. *Cooke* (6) before the full Court.

JEUNE P. I think I can yield to the arguments addressed to me. I am anxious to do so if I can. The principle is as clear as possible. When the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties, and a person who goes back to live with his or her guilty spouse goes back on that implied condition alone. Desertion is as serious a matrimonial offence as can be imagined, because it probably results in breaking up the matrimonial home. My doubt when this case first came before me—and I do not say that it has even now been altogether dispelled—arose upon the terms of the Act of 1857 (20 & 21

(1) 69 L. T. 498.
(2) (1863) 3 Sw. & Tr. 126, 137.
(3) (1865) 4 Sw. & Tr. 105.
(4) 4 Sw. & Tr. at p. 106.
(5) 4 Sw. & Tr. at p. 108.
(6) 3 Sw. & Tr. at pp. 246, 247.

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Vict. c. 85), which made desertion for the first time a matrimonial offence. The Act made desertion a matrimonial offence for certain specified purposes, and amongst these was *not* the revival of previous misconduct. In holding as I am now about to hold, I feel that I am doing something which is not mentioned in the Act itself.

But condonation, not only in previous cases under the old ecclesiastical law, which of course would apply in suits for judicial separation but not in suits for dissolution of marriage, —condonation is to be, in the terms of the Act, an answer to the suit, and in the old sense of the term, namely, conditional on future good conduct. So far, then, the Act of 1857 proceeded by bringing in the term condonation in the old technical meaning of the law, with the condition that is attached to it that there should be future good conduct. Under these circumstances, one is entitled to look not only at acts of matrimonial misconduct as they were recognised before the Act, but to look also at the law as it stands. As it stands, desertion is a matrimonial offence of a serious kind, and one would be ignoring the effect of condonation, namely, its conditional forgiveness, by holding that cruelty and adultery would revive a previous matrimonial offence, but that desertion would not.

There is no distinct decision on the point; but the language used by the Judge Ordinary in *Dent* v. *Dent* (1) appears to me to be wide enough, on the whole, to carry one to that conclusion. He said this: "Now the rule of law is, that all condonation is conditional, and the condition is, in future you shall treat me as a husband ought to treat his wife; and if you hereafter break your matrimonial obligation, and are guilty of adultery or of cruelty, the condoned offence is revived." That would seem to bring in the case of desertion equally with cruelty and adultery. *Dent* v. *Dent* (2) was decided in 1865—that is some years after the passing of the Matrimonial Causes Act, 1857. The decision in *Cooke* v. *Cooke* (3) I look upon very much in the same way. It was decided in 1863, and the judgment of the full Court contains this passage: "The wife appears to

(1) 4 Sw. & Tr. 105, 106. (2) 4 Sw. & Tr. 105.
(3) 3 Sw. & Tr. at pp. 246, 247.

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have been willing to condone, provided she was treated by her husband in the manner she had a right to expect, if she returned to live and cohabit with him. She was not, on her return to him, treated by him in the manner she ought to have been . . . . and upon non-compliance with that which was a condition of condonation the offences said to have been condoned were revived." I do not see why that also should not apply to a case of desertion equally with adultery and cruelty. It rests on the meaning to be attached to condonation, and, taking it to mean that it is a conditional forgiveness, I think I am justified in holding that the Act of 1857 is as efficacious to revive by subsequent desertion as it is to revive by subsequent cruelty or adultery. I am prepared to take this step on principle—a principle which may be said to be to some extent supported by judicial authority, or, at any rate, not to be contradicted by it.

I therefore pronounce a decree nisi with costs, and I order that the petitioner may have the custody of the children of the marriage.

*Newson* asked that the decree might be dated back to the day when the case was first before the Court.

JEUNE P. I do not like to do that. No decree is pronounced till to-day. But I will say that the petitioner may apply to have the decree made absolute in six months from May 4.

Solicitors: *Spencer, Chapman & Co.*

H. D. G.

## ROBINSON *v.* ROBINSON AND DEARDEN.

1903
*May* 6.

*Divorce—Husband's Petition—Wife's Adultery—Passive Acquiescence on Husband's Part—Conduct conducing to Adultery—Refusal of Decree.*

Where, in a petition for divorce by the husband on the ground of his wife's adultery, it appeared that he had taken no steps beyond mere verbal remonstrances to terminate a course of conduct on the part of his wife and the co-respondent, which, if it did not bring about actual adultery at the time, eventually resulted in it:—

*Held*, that the petitioner was not entitled to relief, and that the petition should be dismissed.

HUSBAND'S petition for dissolution of marriage on the ground of the wife's adultery with the co-respondent, who had lodged with the parties before they separated.

The co-respondent filed an answer denying the adultery.

The respondent also filed an answer denying the adultery and countercharging cruelty against the petitioner.

At the hearing neither the respondent nor the co-respondent appeared, and the case, though in the defended list, accordingly came on as undefended.

The material facts appear in the judgment.

*Pridham Whippell*, for the petitioner.

BUCKNILL J. I cannot see my way to grant a decree in this case. It seems to me, after hearing the evidence of the petitioner, that, to employ an expression which has been used before by one of the judges of this Court, there was, on the part of this petitioner, "voluntary blindness" to the misconduct of the respondent and co-respondent.

The story is very short and simple. The husband leaves Lancaster to seek work. He comes back and finds Dearden, the co-respondent, who was a friend of his, lodging in the house. The co-respondent says something to him which causes him the greatest surprise. It was a shock to him. So far, nothing can be said against the petitioner. But the

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co-respondent continued living in the house, and the intimacy between him and the respondent grew. The wife would not allow her husband to occupy the same bed with her, and the petitioner's daughter was not allowed to call him "father," but "Mr. Robinson." The respondent and co-respondent frequently sneered at the petitioner and paid no respect to him; and the petitioner allowed this state of things to go on. Matters got worse and worse, as one would naturally expect, until, on June 1, the petitioner found his wife and the co-respondent coming up to bed after he himself had retired for the night. That ought to have aroused his suspicions. On another occasion the petitioner says that he saw his wife and the co-respondent embracing and kissing each other. What did he do? He merely went down and talked to the co-respondent, and threatened to turn him out. He says he did not actually turn him out because the co-respondent stated that his mother was coming to stay in the house. On another occasion the petitioner says that he saw his wife leaning on the co-respondent in an indecent or improper manner. What did he do then? Nothing. On June 15 the petitioner comes home and finds them in a bedroom together, but he appears to have accepted the ridiculous excuse that the co-respondent was going to wash his hands. It is too absurd and ridiculous for a man to accept such excuses under such circumstances.

Matters were brought to a head, not by any action taken by the petitioner against the co-respondent, but by the respondent taking proceedings against the petitioner in the police court, with the result that he was found to have been guilty of "persistent cruelty" towards her, and a separation order was granted to the wife, with 10*s*. a week and the custody of the child.

After that the respondent and co-respondent leave the house, and go away and live together in adultery.

Upon these facts I come to the conclusion that the petitioner, by tacit acquiescence, allowed his wife so to carry on and conduct herself with the co-respondent, and the co-respondent with her, that adultery has resulted.

In that condition of things I will not grant a decree. I dismiss this petition.

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Solicitors for petitioner: *Hamlins, Grammer, & Hamlin, for R. Knight, Morecambe.*

H. D. G.

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## WILSON *v.* WILSON.

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*April* 28; *May* 18.

*Practice—Matrimonial Suit—Colonial Marriage—Malta—Evidence of Validity.*

In a matrimonial suit, where there is a practical difficulty in the way of a petitioner adducing the usual evidence of a lawyer who is or has been practising in the Courts of the Colony where the marriage of the petitioner was celebrated, the Court may accept the evidence of a gentleman who, not as a mere amateur, but from his professional research and experience in relation to the marriage laws of the Colony in question, is, in the opinion of the Court, sufficiently qualified to express an opinion as to the validity of a marriage there celebrated.

THIS was an undefended suit by the wife.

Evidence of desertion was given, and the Court intimated that a decree of judicial separation would be pronounced on formal proof of the marriage.

The Court gave leave to prove the validity of the marriage by affidavit, and adjourned the further hearing for that purpose.

The marriage was solemnized on February 9, 1888, at the Collegiate Church of St. Paul, Valletta, by licence, according to the rites and ceremonies of the Established Church.

*Durley Grazebrook*, for the petitioner, tendered an affidavit sworn by Dr. Thomas Hutchinson Tristram, who was described as one of His Majesty's counsel learned in the law, advocate of the Doctors' Commons Bar, and Chancellor of London. The petitioner's solicitors had found it impracticable to obtain in London an affidavit by a practising advocate of the Maltese Bar, and the cost of sending out to Malta to obtain such an affidavit as the Court usually required would, in this case, be

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prohibitive. The petitioner's solicitors had, in the last resort, been referred to Dr. Tristram, whose affidavit shewed that he had, in the course of his official duties and practice, made considerable researches into the marriage laws of Malta. There was no hard and fast rule which bound the Court to insist upon proof of a marriage being given only by a practising lawyer of the particular Colony or foreign country in which the marriage in question had been solemnized. The Court had, in fact, relaxed that strict rule of practice in *Cooper-King* v. *Cooper-King* (1), and had also on one occasion accepted the evidence of a notary to prove the law of one of the South American Republics.

The affidavit of Dr. Tristram stated that since he was called to the Doctors' Commons Bar, in 1855, it had been his practice to advise, as a civilian, on the marriage laws of the British Colonies, including the marriage law of Malta; and he was leading counsel for the Colonial Office in the special reference to the Privy Council in the matter of the validity of the mixed and unmixed Protestant marriages in Malta in support of the validity of such marriages. That case was argued before the Judicial Committee of the Privy Council in January and February, 1894, and the Lords of the Council reported, on August 13, 1895, that the unmixed marriages by the clergy of the Church of England appeared to be fully sanctioned by modern usage. Deponent was retained in the said case in July, 1892, and from that date until the time of the hearing before the Judicial Committee he was engaged in investigations on the marriage laws of Malta and in advising on the evidence in the case, and he thereby became fully acquainted with the marriage laws of the said Colony.

Dr. Tristram further deposed that he had examined the certificate of marriage in the case now before this Court, and he stated, pursuant to the report of the Judicial Committee before referred to, that a valid marriage was celebrated between the petitioner and respondent, and that the said certificate now before the Court would be accepted in the Courts of law in Malta as evidence of the validity of the said marriage.

(1) [1900] P. 65.

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JEUNE P. No doubt it has been the general rule of practice in matrimonial suits arising out of Colonial or foreign marriages to require evidence of the validity of such a marriage to be given by some gentleman practising in the Courts of the Colony or country in which the marriage has been celebrated. But I do not think that the Court is bound by such a hard and fast rule that it may not be relaxed in exceptional cases; and, in such a case as this, if I am satisfied that the evidence tendered in support of the validity of the marriage is that of a gentleman well qualified, not as a mere amateur, but for reasons connected with his profession or business, to express an opinion on the subject, it is open to me to act upon that evidence and to hold the validity of the marriage to be established. I think that the deponent in the present case has shewn himself sufficiently qualified to express an opinion. I, therefore, hold that the validity of this marriage has been established, and, upon the evidence before me on the last occasion, I pronounce a decree of judicial separation on the ground of desertion, with costs against the respondent, and I order that the petitioner may have the custody of the children of the marriage.

Solicitors: *Ridsdale & Son, for George Crombie & Sons, York.*

H. D. G.

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*April* 1.

## THE MARGUERITE MOLINOS.

*Admiralty—Salvage—Information by one Person leading to a Salvage Service by another Person—Lifeboat Crew.*

The coxswain of a lifeboat, whilst endeavouring with his crew to put off to a vessel in distress, sent a telegram for the assistance of tugs. The owners of the tugs had, however, previously heard of the position of the vessel, and were already despatching their tugs. In an action of salvage:—

*Held*, by Bucknill J., that, though a person may hold the position of a salvor who does nothing more than give information, outside his duty, of such a nature as to be the cause of acts subsequently done by others which are salvage services, the claim in the present case failed, as the telegram sent by the coxswain of the lifeboat was not in fact the cause of the tugs going out to the rescue of the vessel.

The onus is upon the crew of a lifeboat, going out to save life, to shew that they have rendered services entitling them to be regarded as property salvors.

Consolidated Actions of Salvage.

The plaintiffs were the owners, masters, and crews of the steam-tugs *Humber*, *Terrier*, and *J. W. Jewitt*, and David Pye, coxswain, and the crew of the *Spurn* lifeboat. The defendants were the owners of the *Marguerite Molinos*.

The facts were shortly as follows:—

The *Humber* is an iron paddle-tug of 131 tons gross register, 40 horse power nominal, manned by a crew of 7 hands, and of the value of 6000*l*. The *Terrier* is an iron screw-tug of 78 tons gross register, 35 nominal horse power, manned by a crew of 5 hands, and of the value of 3000*l*. The *J. W. Jewitt* is a paddle-tug of 97 tons gross register, 39 horse power nominal, manned by a crew of 5 hands, and of the value of 1500*l*. The *Spurn* is a new wooden lifeboat belonging to the Hull Trinity House, and carries a crew of 10 hands. She is always kept afloat to moorings inside the Spurn Point, and has a steam tender to work between herself and the shore.

On February 26, 1903, the *Marguerite Molinos*—an iron French barque of 2005 tons gross register, from Hull to

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Swansea in ballast, with a crew of 15 hands, and of the value of 9500*l.*—left Hull in tow of a tug; but on getting outside the Humber turned back to shelter from a gale which suddenly sprang up from the southward. Whilst making for Grimsby Roads the hawser parted, and, the tug being unable from her draught of water to follow her, the *Marguerite Molinos* drifted towards the Trinity Sand, near which, on February 27, about 3.30 A.M., she let go her anchor and brought up about 1¼ miles N.N.W. of the Spurn light. About four hours later, on the tide ebbing, she took the ground, and, about 11.30 A.M., was left high and dry, without, however, apparently sustaining any damage. Those in charge of her exhibited signals for the assistance of a tug, which were answered from the Spurn Lighthouse.

The distress signals were seen from the shore, and an attempt was made to launch the tender of the lifeboat, but owing to the heavy weather the attempt at first failed, and the plaintiff, the coxswain of the lifeboat, telegraphed to Grimsby for the assistance of tugs. About 12.30 the crew of the lifeboat succeeded in launching the tender; but, failing to reach the lifeboat, they proceeded on in the tender, arriving at the barque about 2 P.M. Five of her crew went on board, and according to the evidence of the master of the barque, though they were told that their assistance was not wanted, they stayed on the ship until she came off.

About 2.30 P.M. the tug *Humber* came up and passed a rope by floating a heaving-line. The barque then got up her anchor, and whilst doing so the other two tugs made fast ahead of the *Humber*, and as the tide made the barque floated, and was subsequently towed to an anchorage.

By their defence the owners of the *Marguerite Molinos* admitted that salvage services had been rendered to their vessel by the tugs; but denied that any salvage service had been rendered by the lifeboatmen. In the course of the trial it appeared that the telegram sent by the coxswain of the lifeboat was not the first intimation that assistance was required, as an earlier message had been sent by the lady operator at the Spurn Lighthouse in the course of her duty.

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*Aspinall, K.C.*, and *Laureston Batten*, for the plaintiffs, the owners, masters, and crews of the three tugs. This large French barque was lying fast aground, abandoned by the tug which had had her in tow. She could not have got off without help, as on the tide making she would, had she not been held by the tugs, have drifted further up the Sand, and in the heavy weather prevailing would almost certainly have been lost. She lay on hard uneven ridges of sand, and being in ballast with heavy top hamper, she would eventually have either fallen on her beam-ends or broken her back.

*A. E. Nelson*, for the plaintiffs, the coxswain and crew of the *Spurn* lifeboat. The dangerous position of the barque and her signals of distress were seen by the watchman on duty, and, after the crew of the lifeboat had been warned, every possible effort was made to launch the tender, and it was at very considerable personal risk in the heavy weather prevailing that, after failing to reach the lifeboat, her crew started for the barque in the tender, and succeeded in getting on board, when, according to the evidence of the plaintiffs, the master at once took advantage of their local knowledge to ascertain his position, and availed himself of their services to assist the crew in making fast to the tug, and getting in the anchor.

The prompt arrival of the tugs was due to the telegram sent by the coxswain of the lifeboat before leaving the shore, and giving such information is in itself a salvage service. In *The Sarah* (1) a tug, having a vessel in tow, saw a ship ashore, and went out of her way to inform another tug of what she had seen. For thus setting in motion the machinery by which the subsequent service was rendered, the Court awarded the sum of 60*l*. So in *The Nile* (2) Sir Robert Phillimore made an award of salvage to the commander of a war-ship who "set in motion" a salvor; and in *The Ocean* (3) the carrying an order for a steamer to go out of harbour to a vessel which was in danger was held by Dr. Lushington to be a salvage service.

*Laing, K.C.*, and *Alexander D. Bateson*, for the defendants, the owners of the *Marguerite Molinos*. The evidence is that the

(1) (1878) 3 P. D. 39. (2) (1875) L. R. 4 A. & E. 449, at p. 455.
(3) (1843) 2 Wm. Rob. 91.

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barque was not in danger of total loss, nor in any immediate danger, nor was she hard and fast aground when the tide made. She only required one tug for which she had signalled; but for such assistance as was rendered by all three tugs the owners of the barque must, no doubt, in the circumstances pay.

As to the claim of the lifeboatmen, the fact of going out to save life does not give rise to any claim for salvage, and, as regards the alleged assistance rendered, the master of the barque denies that he requested the coxswain to point out his position, and he asserts that the services of these boatmen were not required. Anything done by them was done after being told that their presence was not desired. The telegram was not necessary, as the tugs were already starting in response to a previous message sent in consequence of the barque's signals.

In *The Chiltonford* (1) an attempt was made to set up as a salvage service the sending of a message by telephone; but the President dismissed the claim, and said the action ought never to have been brought. The case of a tug coming in from sea and giving warning that a ship is in distress stands on a different footing, and the other two cases cited on behalf of the coxswain have no similarity to the present.

BUCKNILL J. These are consolidated actions brought by the tugs *Humber*, *Terrier*, and *J. W. Jewitt*, and by the coxswain and crew of the *Spurn* lifeboat, for salvage services alleged to have been rendered to the French barque *Marguerite Molinos* on February 27 last. As in order of time the lifeboat's case has been taken first, I will deal with that at once. As regards what took place after the lifeboatmen in their tender got alongside the French barque, I accept the story of the master of the barque, and I find as a fact that his story is correct, and that the services of the lifeboatmen were never accepted as salvors. I have further to decide whether the coxswain of the lifeboat is entitled to any salvage by reason of the telegram sent about noon. It was handed in at 12.35, and was signed by Pye, the coxswain of the lifeboat. It ran—"Barque ashore Trinity Sand wants assistance." Until the tug owner was

(1) W. N. (1901) 48.

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called I was in some difficulty on the question of law; that is to say, I was not at all clear whether that telegram would in the circumstances entitle the coxswain, or any other person connected with the lifeboat, to hold the position of salvors under the authorities which have been cited.

The law is clear, that where a person does something, outside his duty, of such a nature as to be the cause of an act done by another which is a salvage act, he may himself hold the position of a salvor although he has done no more than give information. A messenger from the sea coming in and telling another that a ship is in peril is entitled to be treated as a salvor if, in consequence of his information, the other goes out and renders salvage services to that ship. But each case must depend on its own facts. What are they here? The tug owner, being asked how he came to send out his tugs to the *Marguerite Molinos*, said that he had received a telegram from the coxswain of the lifeboat; but it turned out on further examination of the tug owner that he had received another telegram earlier in the morning, which was from the telegraph clerk at the Spurn Lighthouse, and that the crews of the tugs were already getting ready to start when the second telegram arrived. That second telegram was useless, and I so decide.

I cannot, therefore, take into consideration the courageous endeavours of the lifeboat crew, lasting nearly four hours, to launch the tender of the lifeboat.

Lifeboatmen must understand that when they have gone out to save life, as members of a lifeboat crew, the onus is on them to prove that they have afterwards become entitled to salvage reward as against the property alleged to be in peril. Here I find that they were not allowed to go on board the *Marguerite Molinos* as salvors—but were only, as far as the coxswain was concerned, invited to come, the others inviting themselves on board, not for the purpose, as the master of the barque thought, of rendering salvage services, but for the purpose of looking round—I am obliged to hold on the facts of the case that the little they afterwards did was not in fact salvage work. They were not salvors. Their suit must therefore fail, and I regret to say that it must be dismissed with costs.

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Bucknill J.

As to the three tugs, there is no doubt they are salvors. The ship was on the sands. She had been high and dry. She had received no injury, and she would have floated at the turn of the tide; but she had had very bad weather. It is satisfactory to know how it is that the vessel which was towing her was unable to render assistance. She was a screw vessel, and I gather she drew as much water as the barque; so there was ample reason, though we have not had that explained, why she did not go to the barque's assistance. Well, these tugs got into position, and after ten minutes' towing got her afloat. The weather had been bad; but it was rapidly moderating, and I am advised that the tug *Humber* would have been able to get the vessel off. The master of the *Humber* did not attempt to exaggerate, and I think his evidence was very fairly given; but he had a doubt, and, having a doubt, he erred in the right direction. He said, "I may not be able to get the barque off myself. I will take the services of the other two tugs." The fact is that these three boats are all of them salvors; but I cannot give a heavy award. The tugs were not in any danger. It is not one of those cases where there was bumping or where they were girted. I am not sure if the barque had been there another tide she would have taken any harm. When the weather got down to the force of two, one tug would have been able to get her off; but they must be paid, and the result is that I award 500*l.*—300*l.* to the *Humber*, and 200*l.* to the two other tugs, with costs.

As the bail demanded, 2600*l.*, was exorbitant, I order the salvors to pay the bail fees above 1000*l.*

Solicitors for plaintiffs, the steam-tugs and the coxswain and crew of the *Spurn* lifeboat: *Pritchard & Sons, for A. & M. Jackson, Hull, and E. S. Wilson & Sons, Hull.*

Solicitors for defendants, owners of the *Marguerite Molinos*: *Waltons, Johnson, Bubb & Whatton.*

T. L. M.

1903
*April* 7, 8.

## THE AUGUST KORFF.

*Admiralty—Salvage—Standing by—Attempting to tow—Services rendered at request—Principles upon which Awards made.*

A steamship, valued at 27,000*l.*, from Philadelphia to Bremen, with a part cargo of petroleum, belonging to the owners of the steamship, of the value of 7578*l.*, the rest naphtha valued at 7000*l.*, and freight at risk 1743*l.*, became disabled so that she would not steer when about 1000 miles from Falmouth. After making some progress to the eastward, she was fallen in with by steamship No. 1, the master of which agreed to attempt to get her to Fayal; but, owing to very bad weather, after standing by and steering her for a few miles, he left the disabled vessel. She was then picked up by steamship No. 2, and towed 265 miles, when, owing to damage to the machinery of the salving vessel and the hawser parting, the disabled steamer was lost sight of. Steamship No. 3 then came up; but after a difficult towage of about twelve miles left her owing to being short of feed for the horses she was carrying. Steamship No. 4 then established communication with her, and towed her 468 miles to Falmouth, being accompanied by steamship No. 5, which belonged to the same owners as the disabled vessel, and acted as a stand-by in case of emergency. In consolidated actions of salvage by the owners, masters, and crews of the five steamships:—

*Held*, by Bucknill J., that steamship No. 1 was entitled to 800*l.* by way of payment for work done in standing by and, at request, attempting to tow, within the principle laid down in *The Benlarig*, (1888) 14 P. D. 3; that steamship No. 2 was entitled to a salvage award of 2500*l.* for having, within the principle laid down in *The Atlas*, (1862) Lush. 518, and *The Camellia*, (1883) 9 P. D. 27, meritoriously contributed to the ultimate safety of the disabled vessel, the award being fixed at a lower standard than that to which the principal salvor was entitled, as the part taken by this salvor by itself would not have produced the successful result; that steamship No. 3 was, on similar grounds, and as having brought the disabled steamer within sight of the principal salvor, entitled to an award of 800*l.*; that steamship No. 4, having towed the disabled steamer into a port of safety, was entitled, as the principal salvor, to an award of 4000*l.*; whilst the owners of steamship No. 5 were entitled, as against the naphtha cargo, to an award of 300*l.*, and her master and crew, as against ship, cargo, and freight, to an award of 150*l.*, making a total of 8550*l.*

Consolidated Actions of Salvage.

The plaintiffs were the owners, masters, and crews of the steamships *Albuera*, *Acacia*, *Marquette*, *Snowflake*, and

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*Burgermeister Petersen.* The defendants were the owners of the *August Korff*, her cargo and freight.

The facts were shortly as follows:—

The *August Korff* is a three-masted oil-tank steel screw steamship, belonging to the port of Hamburg, of 4055 tons gross register, with triple-expansion engines of 302 horse power nominal. She was on a voyage from Philadelphia to Nordenhamn, near Bremen, with a part cargo of petroleum, the property of her owners, and the rest naphtha, the property of the American Petroleum Company of Antwerp. She was manned by a crew of thirty-seven hands all told, and her value in her damaged condition was 27,000*l.*, the value of the petroleum 7578*l.*, the value of the naphtha 7000*l.*, and freight at risk 1743*l.*, making a total of 43,321*l.*

On December 1, 1902, when in latitude 48° 19′ N., and longitude 32° 26′ W., or about 960 miles from Queenstown, a heavy sea struck her, and carried away the rudder and part of the rudder-post. She exhibited signals of distress, and to lighten the ship, and enable her to make better weather, the naphtha in Nos. 1 and 2 tanks, and the petroleum in No. 8 tank, were pumped out. With the aid of her engines and sails she made some way to the eastward, but edging off to the northward of the track of Atlantic steamers.

On December 2 a steamship fell in with her, and attempted to steer her by making fast astern, but gave up the attempt and proceeded on her voyage. On December 5, when the *August Korff* was about 110 miles to the eastward of the position she was in when disabled, her distress signals were observed by the *Albuera*, a steamship of 3460 tons gross register, with engines of 1350 horse power indicated, on a voyage from Glasgow to Boston with a cargo of coal, manned by a crew of twenty-five hands all told, and of the value of 45,000*l.*, cargo and freight 4250*l.*, together 49,250*l.* She was asked to stand by, and, after some communication by boat, the master of the *Albuera* agreed to try and get the *August Korff* to Fayal.

The *Albuera* was made fast astern, but, owing to heavy weather and the violent sheering of the disabled vessel, the

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hawsers twice parted, and, on December 7, the *Albuera*, after offering to take the crew off, left, having assisted the *August Korff* about sixteen miles to the southward. The disabled vessel made some sixty miles of easting, and, on the evening of the same day, her red lights and signals of distress were noticed by the *Acacia*, a steamship of 2885 tons gross register, with engines of 250 horse power nominal, on a voyage from Middlesborough to Philadelphia, with a cargo of railway material and pig-iron, manned by a crew of twenty-five hands all told, and of the value of 35,000*l.*, that of her cargo 11,775*l.*, and freight 1474*l.*, total 48,249*l.* The weather being too bad to speak her, the *Acacia* kept her in sight till daylight (December 8), and then agreed to attempt to tow her to Queenstown. By means of a line floated from the *Acacia* a hawser was, after some difficulty and using oil to deaden the sea, made fast, and towage commenced at mid-day, but on the following afternoon the tow-rope parted. Communication was re-established by a boat from the *Acacia*, and towage was resumed. On December 10 and 11 a strong gale prevailed, rendering the towage difficult. The wheel chains of the *Acacia* carried away, and some repairs were necessary to the engines involving some delay. During a squall both ropes parted, and, after a towage of 265 miles, the *August Korff* was lost sight off.

On the three following days the weather was very bad, but the *August Korff* succeeded in making a considerable amount of easting, and, on the night of December 14, she was about 620 miles from Falmouth, when she was observed by the *Marquette*, a steel screw steamship belonging to the Atlantic Transport Line, of 7057 tons gross register, with engines of 770 horse power nominal, on a voyage from New York to London with horses, sheep, and a general cargo, manned by a crew of 112 hands besides nine horsemen, and of the value of 133,000*l.*, cargo 130,510*l.*, and freight 6323*l.*, total 269,833*l.*

Communication was established by a boat sent from the *Marquette*, and the master of the latter vessel agreed to attempt to tow the *August Korff* to Falmouth; but the

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weather was so heavy that the boat sent to carry a line was damaged, and her crew, consisting of the chief officer and five hands, had to remain on board the *August Korff*. Eventually, by means of a lifebuoy, hawsers were, on the morning of December 15, made fast, and towage commenced; but the ropes parted after a towage of about twelve miles, and, the chief officer and five hands having reached the *Marquette* in the lifeboat of the *August Korff*, the *Marquette* supplied the *August Korff* with some provisions, and, on the morning of December 17, owing to being short of feed for the horses, she left.

On December 18 the *August Korff* was sighted by the *Snowflake*, a steel screw tank steamer of 2710 tons gross register, with engines of 247 nominal horse power, on a voyage from New York to Hull with a cargo of petroleum in bulk, manned by a crew of thirty hands all told, and of the value of 30,000*l*., cargo 15,800*l*., freight 2640*l*., total 48,440*l*.

The chief officer of the *Snowflake* went in a boat with three seamen to the *August Korff*, and agreed to take her in tow. After the ropes had been made fast the *Burgermeister Petersen* came up, a steel steamship, specially constructed for the carriage of petroleum in bulk, of 2788 tons gross register, with engines of 225 nominal horse power, on a voyage from New York to Bremerhaven with a full cargo of petroleum, manned by a crew of thirty-four hands all told, and of the value of 22,500*l*., cargo 16,737*l*., freight 2300*l*., total 41,537*l*.

As the *Burgermeister Petersen* belonged to the same owners as the *August Korff*, the master of the latter vessel wished to employ the *Burgermeister Petersen*; but the master of the *Snowflake* insisted that he could proceed without assistance, and accordingly the *Snowflake* continued the towage, the *Burgermeister Petersen* agreeing to stand by and accompany the two vessels. After three hours both hawsers parted, and communication was with difficulty re-established on the following morning (December 19). Towage then continued in moderate weather until the afternoon of December 22, when, after a towage of 468 miles, the vessels arrived off Falmouth, and the master of the *Snowflake* engaged two tugs

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at 50*l.* each to take the *August Korff* into the inner harbour, where on December 23 she was safely moored.

By their defence the owners of the *August Korff*, her cargo and freight, admitted that salvage services had been rendered by the owners, masters, and crews of the *Acacia* and *Snowflake*, and by the master and crew of the *Burgermeister Petersen*, and to the naphtha forming part of the cargo of the *August Korff* by the owners of the *Burgermeister Petersen*; but the defendants denied that salvage services had been rendered by the owners, masters, and crews of the *Albuera* and *Marquette*.

April 7. *Aspinall, K.C.*, and *Alexander D. Bateson*, for the plaintiffs, the owners, masters, and crews of the *Albuera* and *Snowflake*. The *Albuera* stood by at request, and agreed to attempt to get the *August Korff* to Fayal. The attempt failed, but the *August Korff* was steered some sixteen miles to the southward, and as she was thereby prevented drifting to the northward she was placed in a better position for being picked up. Some of her ropes were damaged and lost, she was delayed thirty-eight hours, and incurred expenses. In *The Cambrian* (1) it was held that where a vessel stands by, or renders services to another, upon request, even though no benefit results from her so doing, she is entitled to salvage remuneration, and Gorell Barnes J. in his judgment refers to *The Helvetia* (2), in which he quoted remarks to the same effect in the judgment of Dr. Lushington in *The Undaunted* (3), and in Kennedy J.'s work on Salvage at p. 37.

The *Snowflake* is a valuable vessel carrying a delicate class of cargo—oil in bulk. When she came up the situation of the *August Korff* was one of considerable risk. She had been drifting about the Atlantic for eighteen days, and had been abandoned by several steamers. She was getting short of provisions, and the *Snowflake* was the effective salvor, towing the *August Korff* a distance of 468 miles to a port of safety. Five days were occupied in towing and standing by. The

(1) (1897) 8 Asp. M. L. C. 263. (2) (1894) 8 Asp. M. L. C. 264, n.
(3) (1860) Lush. 90, at p. 92.

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boat service was dangerous and involved the loss of the boat. Ropes were damaged, and expenses were incurred for tugs and port charges at Falmouth.

*Aspinall, K.C.*, and *Pritchard*, for the plaintiffs, the owners, master, and crew of the *Marquette*. The services of the *Marquette* were meritorious, as she stood by the *August Korff* and agreed to attempt to tow her to Falmouth. She did in fact tow her some twelve miles, and thereby enabled her to be picked up by the *Snowflake*. The chief officer and some of the crew incurred considerable risk in the boat service, and expense was entailed by the loss of the lifeboat and damage to hawsers. The supply of provisions was of benefit to the *August Korff*, and on the parting of the hawser further towage became impracticable, as the master of the *Marquette* could not risk further delay, entailing possible loss of some of the horses, which he was under contract to deliver in time for the Buffalo Bill Wild West Show in London.

*Dawson Miller*, for the plaintiffs, the owners, master, and crew of the *Acacia*. The failure of the agreed attempt to tow the *August Korff* to Queenstown was not due to any fault of the *Acacia*, but to the damage she sustained to her machinery and the parting of the hawser after a towage in very bad weather of over 220 miles as the crow flies. The boat service was exceptionally dangerous and the boat was damaged. Nearly five days were lost in performing the towage service in the opposite direction to that in which the *Acacia* was bound, and further time was lost before she regained the position from which she started to tow.

*Pickford, K.C.*, and *Leck*, for the plaintiffs, the owners, master, and crew of the *Burgermeister Petersen*. Although the owners of this vessel are the same as those of the *August Korff*, they are entitled to claim against that portion of the cargo which did not belong to them, namely, the naphtha, valued at some 7000*l.*, the salving of which entailed expenses and a delay of four days, whilst the master and crew claim against the ship, cargo, and freight, to the safety of which they materially contributed by acting as convoy at the request of the master of the *August Korff*. The services consisted in

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standing by and being ready to assist in case anything went wrong with the towage by the *Snowflake*, and it is probable that, if bad weather had come on, the services of the *Burgermeister Petersen* would have been required for actual towage.

*Laing, K.C.*, and *Lauriston Batten*, for the defendants, the owners of the *August Korff*, her cargo and freight. The salvage suits brought by the *Albuera* and the *Marquette* should be dismissed, for the foundation of a claim for salvage is success. In *The Zephyrus* (1) Dr. Lushington said that a "salvage reward is for benefits actually conferred, not for a service attempted to be rendered;" and in *The Camellia* (2) Sir James Hannen said that "services, however meritorious, which do not in any way contribute to the ultimate safety of the ship, are not entitled to salvage reward." It is true that of late years the rule has been somewhat modified, as in the case of the decision of Butt J. in *The Benlarig* (3), where an award of salvage was refused; but the towing vessel was held entitled to a quantum meruit for carrying out a contract to "attempt" to tow. The soundness of that decision is, however, questioned by Kennedy J. in his work on Salvage at p. 34, though it has led to ingenious attempts by the pleader on behalf of salvors to claim a reward on a low scale by way of payment for work done under the head of an "endeavour to tow"; but even from this lower standpoint the cases of the *Albuera* and the *Marquette* cannot succeed, because in both cases their masters thought they had fallen in with a prize, and what they really determined to do was to tow the *August Korff* to a safe port on the ordinary understanding in salvage of no cure no pay. In that they failed, and, therefore, their claims fail also; nor are they entitled to remuneration under another doctrine, which has been engrafted on the true principle of "success," namely, the supposed right to claim a salvage reward for so-called "engaged" services, or services rendered at request, though no actual benefit resulted to the property in peril, and its ultimate preservation was not thereby effected.

(1) (1842) 1 Wm. Rob. 329, at p. 330. (2) 9 P. D. 27, at p. 29.
(3) 14 P. D. 3.

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In neither of these two cases has any actual engagement or request been proved. Both these vessels stood by and attempted to tow as the commencement of a salvage service which they did not succeed in carrying out, for the few miles of actual towage or steerage in no way contributed to the ultimate safety of the *August Korff*, as she would have been equally well picked up whether a few miles more or less from the position in which she was left by them. No valid distinction can be drawn between these claims and that of *The Dart* (1), where, after a very short time, the tow-rope parted, and the would-be salvor, after standing by with the view of renewing the attempt to tow, finally lost sight of the vessel in distress, which was subsequently salved by another steamship. The salvage action was dismissed on the ground that no material benefit had been rendered, and that the service had not been accomplished which had been undertaken, namely, to tow the other vessel into a port of safety.

No doubt the *Acacia* will receive favourable consideration at the hands of the Court, because she did in fact give the *August Korff* a lift by the way in towing her some 220 miles, though she was not a real salvor like the *Snowflake*, which actually did the work of towing the *August Korff* to a port of safety, and was allowed by the master of the *August Korff* to complete the service, though he might have insisted on the *Snowflake* giving place to the *Burgermeister Petersen*. The claim of the owners of this last-mentioned vessel may be good against the naphtha part of the cargo, and that of the master and crew against the *August Korff*, her cargo and freight: *The Glenfruin* (2); *The Miranda* (3); but the Court is always reluctant to make a large award in respect of such claims as these unless the services are very substantial, which is not the case here, for they only consisted in standing by without danger or risk; and in *The Agamemnon* (4) the Court, whilst admitting that in theory such a claim as this could be made, marked its disapproval by awarding the crew 15*l.* on a value of 105,500*l.*, and made the salvors pay all the costs. In any

(1) (1899) 8 Asp. M. L. C. 481.
(2) (1885) 10 P. D. 103.
(3) (1872) L. R. 3 A. & E. 561.
(4) (1883) 5 Asp. M. L. C. 92.

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event, in fixing the amount of such awards as the Court may decide to give to some of the plaintiffs, it must be borne in mind that, though the salved vessel had encountered heavy weather and lost her rudder, she was in every other respect seaworthy, and with her engines and sails had made considerable progress to the eastward.

April 8. BUCKNILL J. This is a complicated case in which I have been much assisted by the advice of the Elder Brethren.

On December 1, in bad weather, the *August Korff* broke down in the Atlantic about 1000 miles from Falmouth, her rudder and rudder-post carrying away. In all other respects she was seaworthy and tight. Various vessels came to her assistance, and the first of these claiming in the present suit was the *Albuera*, which vessel I find as a fact was, on December 5, engaged to stand by, and her master undertook that he would, if possible, get the *August Korff* to the Western Islands. The *Albuera* tried from December 5 to December 7, and her services were by no means easy. The hawser parted at 12.30 P.M. on the 6th, and at 6.30 P.M. both hawsers carried away. She then stood by till daylight, and ultimately, finding it impossible to do more than she had done, proceeded on her voyage. She attempted to do what she had undertaken to do, that is, that she would do her best to tow to Fayal. Having so contracted and having so attempted, but failed in the attempt, I think the case comes within the language used by Butt J. in *The Benlarig* (1), as follows: "I am glad to be able to hold that they are entitled to some payment, because I think it would be very unfortunate in any way to discourage steamers from rendering assistance to vessels in distress."

The next ship, the *Acacia*, certainly towed the *August Korff* 220 miles as the crow flies; she was four and half days so engaged, and it is said that she lost in all seven days, and sustained damage to the extent of 188*l*. The weather was then very bad indeed, and the *Acacia's* rope parted four times, and she herself was obliged to stop at night for the purpose of making some repairs to the engines, which had been strained or

(1) 14 P. D. 3, at p. 6.

temporarily injured by the services, and she then lost sight of the other ship. It is to be remembered that she might have gone on with the service if it had not been for the accident to her engines which caused her to lose sight of the ship. Her salvage award will be what I call a salvage award pure and simple. I only wish to make part of my judgment the language of Sir James Hannen in *The Camellia* (1), and the language of Dr. Lushington in *The Atlas*. (2) The effect of both of those judgments is set out in Kennedy at p. 29 in these words: "Whilst, however, the general rule which is illustrated by the above examples is clear, and, in the words of Sir James Hannen in a recent case, 'there can be no doubt that services, however meritorious, which do not in any way contribute to the ultimate safety of the ship, are not entitled to salvage award,' it is equally clear from several decisions, and indeed it has been expressly ruled by the Privy Council, that, when a salvage is finally effected, those who meritoriously contribute to that result are entitled to a share in the reward, although the part they took, standing by itself, would not have produced it." Now, here the services of the *Acacia* did meritoriously contribute to the ultimate success. She towed her on her way 220 miles, and but for her the *August Korff* might never have seen the *Snowflake*. The services were well performed, and only abruptly ended in consequence of the accident to the salving ship; but whilst giving her a salvage award, I must do it on a rather different scale from that on which salvage is awarded to the ultimate salvor who really brought the ship into port.

The next ship is the *Marquette*, and it is a matter of regret that she was not more fortunate. She is a valuable vessel of 7000 tons, and had a large crew on board, and was accepted by the master of the ship in distress as an efficient but expensive instrument to effect his salvage. Now, the *Marquette* did not tow very much, and, in the difficulty I have felt as to her case, I have asked the Elder Brethren this question: "Do you think that that which the *Marquette* did was a contribution to the ultimate success?" I will assume that she towed the

(1) 9 P. D. 27. (2) Lush. 518.

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*August Korff* twelve miles—that is to say, she probably towed her a distance which would represent hull-down to a ship, and the *Snowflake*, to pick her up, must have been in sight of her, so that, if the *August Korff* had not been where she was when she was picked up—in other words, had she been twelve miles to the westward of that place—the *Snowflake* might never have seen her. The Elder Brethren advise me that the mere fact of towing this vessel for twelve miles was a contribution, and an important contribution, to the ultimate success of the salvage operations. If that is so, then I find myself obliged, under the passage I have just read, to hold that the *Marquette* is entitled to a share in the award.

The next case is that of the *Snowflake*. It is admitted that she was a salvor. To her services the salved ship is immediately indebted for being brought safely into port, and she is entitled to get the largest share of the award. Her services were not very difficult, but they were well performed.

Then we come to the *Burgermeister Petersen*, and her case introduces what I think is a very pleasant trait in the story of the sea. There is no doubt the master of the salved ship, seeing another ship belonging to his owners coming up, might, if he had chosen, have directed the *Burgermeister Petersen* to get hold of his ship, but with that sort of spirit which, I am sure, prevails amongst sailors, he said: "No, she has got hold of me; she had better do her work, and you had better follow me." That being so, he was doing his duty to his owners in telling the *Burgermeister Petersen* to stand by. She did so, and I have now to consider what is to be given to her owners as against the 7000*l.*, the value of the naphtha cargo, the master and crew of the *Burgermeister Petersen* being entitled to recover against ship, cargo, and freight. The awards which I make are as follows: The *Albuera* 800*l.*, of which her owners will receive 615*l.*, her master 60*l.*, and her crew 125*l.*; the *Acacia* 2500*l.*—1900*l.* to the owners, 200*l.* to the master, and 400*l.* to the crew; the *Marquette* 800*l.*—owners 672*l.*, master 40*l.*, and crew 88*l.*; the *Snowflake* 4000*l.*—owners 3040*l.*, master 320*l.*, and crew 640*l.*; and the owners of the *Burgermeister Petersen* 300*l.*, her master and crew 150*l.* The total

sum will come to 8550*l.*, for which I give judgment with costs. 1903

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Solicitors for the *Albuera*: *Pritchard & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for the *Acacia*: *Downing, Bolam & Co., for Bolam & Co., Sunderland.*

Solicitors for the *Marquette*: *Pritchard & Sons.*

Solicitors for the *Snowflake*: *Pritchard & Sons, for Alsop, Stevens, Hardy & Crooks, Liverpool.*

Solicitors for the *Burgermeister Petersen*: *Piesse & Sons.*

Solicitors for defendants, the owners of the *August Korff*, her cargo and freight: *Thomas Cooper & Co.*

T. L. M.

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[IN THE COURT OF APPEAL.]

C. A. 1903 *June* 9.

## LÖWENFELD *v.* LÖWENFELD.

*Divorce—Practice—Act on Petition—Mode of Trial—Jury—Discretion of Court—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 28, 36—*Divorce Court Rules, December*, 1865, *r.* 61.

Notwithstanding rule 61 of the Divorce Court Rules, 1865, the Court has a discretion whether an act on petition shall or not be tried with a jury.

Decision of the President (Sir F. H. Jeune) affirmed.

APPLICATION to discharge an order made in chambers, directing an act on petition to be tried with a special jury.

On June 30, 1902, the wife filed a petition for the dissolution of her marriage on the ground of the husband's adultery and bigamy. On August 27, 1902, the husband filed an act on petition, alleging that his domicil was in Austria, and that he had never acquired an English domicil. He had married the petitioner in England on December 17, 1884. On March 7, 1902, the marriage was dissolved by the proper Court in Vienna, assuming that the husband had an Austrian domicil. On April 1, 1902, an appeal from that decree was dismissed, and on April 18, 1902, the husband contracted another

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marriage. In her answer to the act on petition the wife alleged that the husband had acquired an English domicil, and that the Austrian Court had no jurisdiction to dissolve the marriage. The act on petition was set down for trial before the judge, but on March 10, 1903, an application was made by the wife to the registrar to order the case to be tried with a special jury. The registrar refused the application. The wife appealed, and on April 4 the President (in chambers) allowed the appeal, and ordered the case to be tried with a special jury. Upon an application by the husband for leave to appeal, the President directed that the case should be reargued in open Court.

May 4. *Bargrave Deane, K.C.* (*R. J. Willis* with him), for the husband. Under the rules of the Divorce Court an act on petition must be tried by the Court itself.

[They referred to the Matrimonial Causes Act, 1857, ss. 28, 36; the Divorce Court Rules, rr. 56 to 61; and Browne and Powles on Divorce, p. 589.]

*Priestley, K.C.*, for the wife. The rules, which are dated in 1865, contemplated that cases of this nature should be tried upon affidavit evidence alone. Rule 61 is not directory, but merely permissive.

*Bargrave Deane, K.C.*, in reply.

THE PRESIDENT (SIR F. H. JEUNE). I am placed in rather a difficult position in deciding this question, because I really have to decide whether either I or some other judge should try the case, or whether a jury should try it; and, in a matter of that kind, it is very difficult to avoid seeming to give greater weight or preference to one tribunal over the other. With regard to the law of the matter, I think it is quite clear that there is a discretion in this Court, and I do not understand that the learned counsel on either side really dispute that—because, although the 28th section of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), says that the parties may "insist on having the contested matters of fact tried by a jury," I think that should be limited, and, as far as I know,

it has always been limited to the cases referred to in the 28th section itself—that is, "the contested matters of fact"—it is not a general section, but the other section which refers to it appears to me really to govern the case. It is that, "In questions of fact arising in proceedings under this Act"—that is to say, the expression is used in the most general manner—"it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the Court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the said Court, by verdict of a special or common jury." Then I think the rule carries the matter really no further, because, though the 61st rule does say "the petition will be heard in its turn with other causes to be heard by the Judge Ordinary, without a jury," that does not prevent an application being made, in a proper case, to take it out of one list and put it into another. I have no doubt that when rule 61 was framed it was contemplated, and, I should think, it is contemplated now, that, in almost every case of an act on petition, the judge would be the proper tribunal, and not a jury, because generally an act on petition raises a pure question of law, though there may be some question of fact on which the law depends. But an act on petition raising purely and solely a question of fact was not, I think, ordinarily contemplated. Probably that accounts for the form of the rule, but I do not think it in any way debars the Court from determining, in a proper case, that it should be tried by a jury. It therefore leaves the Court a discretion with regard to each particular case as to which tribunal should be preferred in matters of that kind. In this case I have to determine whether the wish of one of the parties that the case should be tried by a jury ought to prevail. I approach the question with some hesitation, because the learned counsel tells me, and I daresay tells me quite truly, that there are certain matters in which he thinks the feelings of a jury can be worked upon, and no doubt will be worked upon, in order to induce them to give a verdict on what really is a question of mixed law and fact, namely, the question of domicil. I am afraid I must say he has a perfect right to do that;

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and I suppose many people who come before a jury do not rely entirely on the pure law of the case, but they think their feelings may be influenced to some extent, and that a jury may be induced to give a decision that a judge perhaps would not give. That is the constitutional tribunal, I do not say before this Division, but before other Divisions, and I have no right to find fault with it. In this particular case I am inclined to think that, apart from prejudice, there are questions which are really questions of fact: for instance, that question as to the nature of the husband's property is a matter which a jury would very properly, I think, determine, and any questions of credibility that might arise between husband and wife are questions which, of course, a jury could very properly deal with. I am anxious to go as far as I can in favour of trial by jury, because I do not disguise or wish to disguise my own feeling that a case of this kind is really better heard by a judge than by a jury, partly because, and very materially because, it very often indeed happens that unfortunately juries cannot agree, and that is a contingency which is of a very serious kind, and one to which trial by jury is necessarily exposed. And in regard to questions of domicil, speaking generally, although no doubt they are questions of fact, they are questions of fact so much mixed up with law—so much mixed up with the very peculiar definition of "domicil" according to English law—that, although I should not despair of making a jury understand the matter, I strongly suspect that a jury, especially if it is a sensible jury, would take whatever view the learned judge takes who tries the case and lays it before them.

I should think a jury would probably not be so ill advised as to differ very materially from the judge who had himself formed an opinion on the whole of the case, because it is a case obviously where the dispute of facts has comparatively little to do with the matter, and where it is really a matter of definition which is laid down before the jury and which they would have to follow. Apart from that, and allowing for what I confess is my own natural feeling that a case of this kind can be better tried, in the interests of the parties, by a

judge, I have had to say before, and I must say it again, that I do not think I ought to exclude any party who desires a jury from resorting to that tribunal (unless the case is an obviously improper one to be so tried). It is not, as I have said, the constitutional tribunal of this Division. It is not as if questions of old wills or questions of divorce were ever tried before a jury: they never were, except in certain cases of wills that could be tried before a common law tribunal; but in this tribunal, and in the proceedings in the Ecclesiastical Courts, juries were unknown. In the Common Law Division—not in the Chancery Division—juries were the constitutional tribunal. Therefore I do not feel so bound in this Division as I should in the Common Law Division on the question whether a jury is the proper tribunal or not. At the same time, I cannot help remembering that the Act of 1857 made a very great difference in this matter. For the first time the Act of 1857 brought all matters connected with divorce under the jurisdiction of this tribunal; and, amongst other matters, it brought in these questions of damages, and of actions of common law relating to those subjects which were before exclusively the property of the common law side of our tribunals; and by doing that, the Act of 1857 no doubt intended that all questions of disputed fact should, unless there was a reason against it, be tried by a jury.

Some questions of disputed fact, for example that of damages, were rendered absolutely necessary to be tried by a jury; and, although the Act of 1857 did not go so far as to say that all questions of disputed fact should be tried by a jury, there is a broad indication, I think, that the old state of things was not intended to prevail, and that there would be, in future, at any rate, a right to ask for a jury.

Under these circumstances, there being really disputed questions of fact here, as I think Mr. Priestley has shewn, I feel myself bound to adhere to the opinion which I expressed in chambers. Although I have the strongest feeling that this case might in some senses very likely be better tried by a judge and with more satisfaction to the parties, at the same time, as one party desires very strongly to have the case tried by a

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jury, and to shew me that there are really disputed questions of fact arising, as I think there are, I cannot take on myself to say that that party ought to be excluded from the right of going before a jury.

Therefore I am prepared to try this case with a jury, and I order that it shall be so tried.

H. D. G.

The husband appealed.

June 9. *Bargrave Deane, K.C.* (*R. J. Willis* with him), for the husband. It is submitted that the case ought to be tried by the judge without a jury.

[VAUGHAN WILLIAMS L.J. Has not the judge a discretion as to the mode of trial?]

It is submitted that the judge has no discretion in this case. Rule 61 of the Divorce Court Rules of December 26, 1865, which is still in force, expressly provides that an act on petition is to be heard by the Judge Ordinary without a jury. Those rules were made under a statutory power, and until they have been altered in the proper way they are binding. The learned President in effect held that he had power to alter or supersede the rule.

[VAUGHAN WILLIAMS L.J. A question of domicil is a question of fact: is not a jury the best tribunal to try it? The judgment of the Austrian Court is not an estoppel.]

If the husband's domicil was Austrian the marriage with the petitioner has been dissolved, and the English Court has no jurisdiction. If the question of domicil were the only one, there would be no objection to its being tried by a jury; but extraneous matters, which a judge would exclude, may be brought before a jury, and their minds may be prejudiced, and there may be a miscarriage of justice. In *Tollemache* v. *Tollemache* (1) a similar question was tried by a jury, but that was before the Rules of 1865.

[STIRLING L.J. Sect. 36 of the Matrimonial Causes Act, 1857, provides that "in questions of fact arising in proceedings under this Act" it shall be lawful for the Court to direct the

(1) (1859) 1 Sw. & Tr. 557.

truth thereof to be determined by the verdict of a special or common jury.]

But an "act on petition" is not mentioned in the Act; it is an old form of proceeding in the Ecclesiastical Courts.

[STIRLING L.J. Sect. 6 transferred the jurisdiction of the Ecclesiastical Courts to the Divorce Court.]

Sect. 28 gave the parties to a petition for dissolution of marriage a right to have the contested matters of fact tried by a jury. Rule 61 prescribes the mode of trial of an act on petition. An act on petition is not a proceeding under the Act of 1857.

[VAUGHAN WILLIAMS L.J. I think it is.

STIRLING L.J. Why is it not?]

*Priestley, K.C.*, for the wife, was not called upon.

THE COURT (Vaughan Williams, Romer, and Stirling L.JJ.) dismissed the appeal without delivering any judgments.

*Appeal dismissed.*

Solicitors: *Hollams, Sons, Coward & Hawksley; Slark, Edwards & Co.*

W. L. C.

1903
*April* 6.

## THE PORT CALEDONIA AND THE ANNA.

*Admiralty—Salvage—Agreement under Compulsion to pay an exorbitant Sum.*

Two large laden sailing vessels were sheltering in Holyhead Harbour from a south-westerly gale, when the master of one of them, finding that his vessel had dragged down into dangerous proximity to the other, signalled for a tug. In response to the signal a tug came up; but her master demanded "1000*l.* or no rope." The master of the vessel, which had dragged her anchors, after some demur agreed to pay the sum named, and was towed back to his original berth. In an action brought by the owners, master, and crew of the tug against both vessels, their cargoes and freights upon the agreement in the one case, and for a salvage award in the other:—

*Held*, by Bucknill J., that the agreement entered into by the master of the tug with the master of the vessel which had dragged, having been forced upon the latter by compulsion, must be set aside as extortionate, and an award of 200*l.* made with costs on the county court scale; and that the action against the other vessel must be dismissed with costs, on the ground that no salvage service had been rendered by the tug to that vessel.

Action of Salvage.

The plaintiffs were the owners, master, and crew of the *Sarah Jolliffe*. The defendants were the owners of the *Port Caledonia* and *Anna*, and their cargoes and freights.

The facts were shortly as follows:—

On March 1, 1903, about 9.30 A.M., during a south-westerly gale, the *Sarah Jolliffe*—a screw tug of 299 tons gross register, with engines working up to about 900 horse power actual, a crew of eleven hands, and of the value of 12,000*l.*—was off Holyhead breakwater when those in charge of her observed that a large vessel which had been sheltering in the harbour was dragging down towards another vessel also sheltering in the harbour. The first of these two vessels was the *Port Caledonia* of Glasgow, a steel four-masted barque of 2426 tons gross register, from San Francisco to Queenstown for orders with grain, her value being 15,000*l.*, that of her cargo 21,715*l.*, and freight at risk 4417*l.*, total 41,132*l.* The second vessel was the *Anna*, a four-masted barque of 2663 tons gross

register, from Tacoma on the west coast of America to Queenstown for orders with grain, and her value was 16,000*l.*, that of her cargo 20,906*l.*, and freight at risk 5000*l.*, total 41,906*l.*

The master of the *Port Caledonia* signalled for a tug and a pilot, and on the *Sarah Jolliffe* approaching he hailed that tug, "What will you shift us for?" to which the master of the tug replied, "One thousand pounds." The master of the *Port Caledonia* offered 100*l.*, or to let the matter be settled by their respective owners; but, on the master of the tug refusing, he hailed, "All right, take hold of the ship." The *Sarah Jolliffe* then without much difficulty put her hawser on board, and held the *Port Caledonia* whilst she got her anchors, and subsequently towed her to a safe berth.

By their statement of claim the plaintiffs alleged that the *Port Caledonia* had been lying at anchor about two cables to the southward and westward of the *Anna*, when she dragged down close to, so that the jibboom of the *Anna* nearly overlapped the port quarter of the *Port Caledonia*, and, as both vessels were heading to the wind and fully exposed to the ground swell, if the *Sarah Jolliffe* had not succeeded in towing the *Port Caledonia* away before a heavy squall came on, the two ships would have been foul of one another, and the plaintiffs claimed from "the owners of the *Port Caledonia*, her cargo and freight, 1000*l.*," and "from the owners of the *Anna*, her cargo and freight, such salvage as may be just."

The owners of the *Port Caledonia* by their defence admitted that their vessel had dragged down to within 200 feet of the *Anna* when the master signalled for a tug and a pilot; but they alleged that it was only after the master of the *Sarah Jolliffe* had refused to accept a smaller sum or to leave the matter to be settled between the owners that the master of the *Port Caledonia* agreed to pay 1000*l.* They further alleged that the master of the *Port Caledonia* did not enter, and had no authority to enter, into the agreement for 1000*l.* as agent for any of the defendants, and, if entered into, it was exorbitant, inequitable, and unreasonable.

The owners of the *Anna*, by their defence, denied that salvage services had been rendered by the *Sarah Jolliffe* to

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their vessel, her cargo and freight. They alleged that when the gale came on from the south-west both the anchors of the *Anna* were down in nine fathoms of water, and that when the *Port Caledonia* dragged down to within 250 or 300 feet of the *Anna* the wind moderated, blowing more westerly, so that the tug *Sarah Jolliffe* was able without risk to tow the *Port Caledonia* back to her berth; and, if there had been any danger of collision, the *Anna* could have paid out more chain.

*Aspinall, K.C.*, and *Alexander D. Bateson*, for the plaintiffs, the owners, master, and crew of the *Sarah Jolliffe*. The services of the tug were well and skilfully performed, and averted the very serious damage which would have resulted if the two barques had come into collision, for both vessels would probably have broken away from their anchors and gone on the rocks. The master of the *Port Caledonia* admitted in his evidence that his vessel was "too close to the *Anna* for safety when the tug took hold of her," and that he "consented to pay the 1000*l.* rather than foul the *Anna*."

*Pickford, K.C.*, and *Balloch*, for the defendants, the owners of the *Port Caledonia*, her cargo and freight. The evidence is that the *Port Caledonia* was lying with two anchors down when she dragged, and that her master, thinking it prudent to shift into a berth further from the *Anna*, signalled for a tug and a pilot; that the *Sarah Jolliffe* came up and, without risk, gave her a rope, and at the same time a pilot was taken on board. The *Port Caledonia* was then held up to her anchors, and subsequently towed back to her former berth without difficulty, the whole operation occupying less than two hours.

The amount of duress required to invalidate an agreement at common law is not necessary to induce a Court of Admiralty to refuse to enforce a salvage agreement, and as the claim of 1000*l.* made against the owners of the *Port Caledonia* is exorbitant, and the assent of their master was forced upon him by compulsion, the agreement will be set aside by this Court, and a small sum awarded representing a fair equivalent for the services actually rendered.

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*Laing, K.C.*, and *C. Head*, for the defendants, the owners of the *Anna*, her cargo and freight, were not called upon.

BUCKNILL J. The facts of this case are as follows:—The *Anna*, a large four-masted barque of over 2000 tons register, and laden with a cargo of wheat, was obliged by the weather to take refuge in Holyhead Harbour, where she had been anchored, and where she was entitled to remain as between herself and any other ship not absolutely driven into the neighbourhood by the exigencies of the gale. In other words, other vessels were bound to see that they did not give her a foul berth. Then the *Port Caledonia* came in, also weather-bound. Coming there for refuge, she was brought by her pilot to a position which was a perfectly proper one in the circumstances as they then existed. She also was a large four-masted barque, apparently about the same size as the *Anna*, and had a cargo of approximately the same weight of wheat.

These two vessels were lying inside the breakwater of Holyhead Harbour when, in consequence of the south-westerly gale, the *Port Caledonia*, in the early morning of the day in question, began to drag her anchors, and, being at first in a position of about three ship's lengths from the *Anna*—that is, three ship's lengths clear between the stern of the one and the bow of the other—she dragged about two ship's lengths towards the *Anna*. That is according to the log and according to the case for the defendants. According to the case for the plaintiffs, the vessels were heading S.W., which was the direction of the wind, and the *Port Caledonia* had dragged until she was slightly on the starboard bow of the *Anna*, with a distance of only twenty to thirty feet between them.

In that condition of things—that is to say, the two vessels being in the position that the *Port Caledonia* had dragged her anchors to the extent of at least two ship's lengths—the master of the *Anna* very properly gave warning to the master of the *Port Caledonia* that if he dragged further and got foul of his ship he should hold the owners of the *Port Caledonia* responsible, and there is no doubt that the *Port Caledonia* would be giving the *Anna* a foul berth if she remained there.

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The master of the *Port Caledonia* finding himself in that position signalled first for a tug, and then for a pilot, and the tug and the pilot both arrived. Up to that time I have no fault to find with the tug. The pilot went aboard, and the tug went alongside. I may as well say at once that I find as a fact that the *Port Caledonia* was nothing like as near the *Anna* as the master of the tug would have me believe. I accept the evidence of the master of the *Port Caledonia* and of the master of the *Anna* as to the distance between these two ships, as nearly as they can give it, and of the assistant lighthouse keeper at Holyhead, an intelligent man, who gave his evidence very fairly and very well.

Now the *Port Caledonia* wanted to be shifted. She had dragged and she might drag again, although I find as a fact that at the time the tug came alongside her she was firm to her anchors and was not dragging; but there was always a possibility that she might drag, and if she had dragged with the wind S.W., and remaining in that quarter, serious consequences might have ensued. She probably would have got foul of the other ship, and they might both of them have got adrift, and if the wind had remained in the S.W. they might have got on the rocks; but that is just what did not happen. The wind did not remain in the S.W.; it got round to the W.N.W., and at last to the N.W. Shortly after the tug got alongside the wind was W.N.W., and from that direction there would have been no danger to the two ships.

Then came the question, What was the tug master to get, and what was the master of the *Port Caledonia* to offer for the tug's help? The tug master said—I hope there are not many tug masters who would say it—that he wanted "1000*l.* or no rope." I stopped him before he gave an answer to a question which was put to him by counsel for the *Port Caledonia*, because if he had given a certain answer I am sure his owners would not have allowed him to remain in their employ; but he did say, "I should not have let them go on the rocks. I should have let them break each other adrift, and when they were adrift I should have gone to their assistance, but not unless they gave the 1000*l.*"

I shall not attempt to describe what the Elder Brethren and I think of conduct like that. Language could not be too strong. It was most reprehensible conduct, and, I will add, cowardly. But the master of the *Port Caledonia*, finding himself in a difficulty, promised to give a thousand pounds for the tug's services, which I value at very much less.

The tug having without much difficulty put a hawser on board, held the *Port Caledonia* up so that she could get her anchors. The tug did her work very well. I have no fault to find with that. I am advised that it would have taken some time for those on board the *Port Caledonia* to get in her chain by the manual labour which would have to be used, there being no steam power. In all, the tug was engaged about one hour and forty-five minutes. What she did do she did well. There was no danger to the tug as the wind had moderated. The case has been described as one of towage; but the owners of the barque have admitted that the plaintiffs are entitled to a salvage award.

With the 1000*l.* agreement on one side, and that which I think was the value of the services on the other, I have to ask myself whether the bargain that was made was so inequitable, so unjust, and so unreasonable that the Court cannot allow it to stand?

The first question to consider is, What was the position of the two persons who made the agreement? The position was this. One man was in a position to insist upon his terms, and the other man had to put up with it. He could not help himself. He says in his letter to his owners: "He demanded 1000*l.* to take me away. I offered him 100*l.*, or to leave it to the owners; but he would not agree, so I agreed to give 1000*l.* rather than foul the *Anna*." He appreciated the possibility of fouling the *Anna* if the weather had remained bad, and if the wind had remained in the S.W., neither of which things happened. So he found himself obliged to give way to a person who would not move him, and who would have allowed him and the *Anna* to drift towards the rocks, and who would, I think, have seen them go there without putting a hawser on board unless he got a promise of 1000*l.*

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I have expressed my opinion about the matter. This opinion is shared by the Elder Brethren, and I hold that this agreement cannot be allowed to stand, and I set it aside.

I hope that those who perform such grand services in tugs from time to time, in worse weather than this, and, in peril of their own lives, save property around the coast, will note that this Court will keep a firm hand over them if they attempt to do what has been done in this case.

This was an inequitable, extortionate, and unreasonable agreement, and I think that the services rendered will be well rewarded by the sum of 200*l.*, and with county court costs.

Now, with regard to the claim against the *Anna*. The *Anna* was not, in my judgment, at any time in such a position as that a prudent master would have thought it right and fit or to be his duty to call upon a tug to take the *Port Caledonia* away from him. His own letter shews that. I have asked the Elder Brethren this question in the language of the decisions which are well known: Would he, as a prudent man, have found himself called upon, in the position in which he then was with regard to himself and the *Port Caledonia*, to engage a tug to take the *Port Caledonia* from the place where she was? And the answer is, "No," because there was no danger, or very little danger, and not that sort of danger which allows towage to be turned into salvage. By easing away his own cables he could have increased, as he said, the distance between the two ships; but there was no reason to believe, as the wind was moderating and getting more westerly, that there would be any necessity to do that. In his letter to his owners he said: "I do not consider the *Anna* was in danger as regards the *Port Caledonia* when the gale was blowing. She was 100 yards from our jibboom and we were ready to pay out more cable if required." Then again he says: "The *Port Caledonia*, which had dragged to within about 100 yards towards us, had to engage a tug to avoid collision later on; but that cannot concern the *Anna*." I am reading a translation, and I do not know exactly the idea that was passing through the master's mind; but I think I may say that his idea was that if the wind had got

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round to a dangerous quarter again, and had blown with a force which would have made it possible for the *Port Caledonia* to have done what she did before, then, if steps were not taken, there might have been a collision between the two ships.

There, therefore, was appreciable danger which made it necessary that, as far as the *Port Caledonia* was concerned, she should not continue to give the *Anna* what she had done, namely, a foul berth; but the *Anna* was in no danger according to the language of the master in his letter to his owners.

The result is that there will be judgment against the *Port Caledonia* for 200*l.* with county court costs, and there will be judgment for the *Anna* with costs.

Solicitors for plaintiffs, the owners of the *Sarah Jolliffe*: *Neave & Bretherton, for H. J. Holme, Liverpool.*

Solicitors for defendants, the owners of the *Port Caledonia*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Anna*: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

1903
*June 22.*

## In the Goods of CHAPMAN.

*Probate—Practice—Administration—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—"*Special Circumstances*"—*Person Missing entitled in priority to Applicant.*

The "special circumstances" of each particular case are to be considered by the Court in granting or refusing administration under s. 73 to a person not primarily entitled to a grant; and, where the "special circumstances" justify the conclusion that the person who would be entitled in priority to the applicant may reasonably be presumed to be dead, the Court should grant administration to the applicant, upon his swearing that he believes himself to be the next of kin of the deceased.

*In the Goods of Pridham*, (1889) 61 L. T. 302, explained.

*In the Goods of Reed*, (1874) 29 L. T. 932, and *In the Goods of Callicott*, [1899] P. 189, approved and followed.

Motion for administration, under s. 73, without citing the person who, having disappeared, would, if alive, be primarily entitled to a grant.

Charles William Chapman, late of 649, Leeds Road, Bradford, Yorkshire, died on April 5, 1903, at an asylum in Yorkshire, a bachelor and intestate, leaving property valued at about 500*l.*

His father, Thomas Chapman, who was stated to have been a man of dissolute habits and addicted to gambling, left his wife and family in 1883, taking with him a small sum of money saved by his wife, to whom he wrote from a neighbouring town a few days later, stating that he had spent all the money and had pawned his watch and surplus clothing, and asking his wife to send him money to pay his railway fare. The wife did not answer that letter, and from that time no member of the family had heard anything of or from him.

Harriett Chapman, the wife of Thomas Chapman, had signed a renunciation, believing her husband to be dead.

Before his disappearance, Thomas Chapman had been in the habit of going away for uncertain periods, and returning home when his funds were exhausted.

Arthur Watson Chapman, the elder brother of the deceased C. W. Chapman, now applied for a grant without citing the

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father. He and his sister both swore to their belief in the father's death.

*Eustace Hills*, for the applicant, moved for a grant of administration. More than twenty years have elapsed since the father disappeared, and the circumstances shew that, had he been alive, he would have applied to some members of the family for maintenance or assistance. The time which had elapsed in the case of *In the Goods of Reed* (1) was about the same as in the present case, and the Court should follow that decision. A more recent authority in favour of the applicant is *In the Goods of Callicott* (2) and the special circumstances here are as strong as in that case.

[JEUNE P. referred to another case reported in the same volume: *In the Goods of Harper*. (3)]

It is true that in that case and in the still stronger case of *In the Goods of Pridham* (4) similar applications were refused. The father of the present applicant and of the intestate was last heard of in a town not far off from where the family lived, and he would, if alive, have come back to his wife and family when they were getting on in the world, in view of the fact that he had always been wanting money from them for betting.

JEUNE P. I think that, on the facts of this case, I can accede to the application. The general rule of practice, no doubt, is that there must be citation of the person who, if alive, would have the prior right to administration; but that rule of practice must yield to the exigencies of each particular case. In the case of *In the Goods of Pridham* (4) the Court of Appeal stated that, had the facts been sufficiently strong, they would have been fully prepared to follow the decision of Sir James Hannen in the case of *In the Goods of Reed*. (1) That implies that, in the view of the Lords Justices, which is, of course, binding on this Court, each case of this nature is to be decided on its own merits.

In the present instance, the man in question disappeared

(1) 29 L. T. 932.
(2) [1899] P. 189.
(3) [1899] P. 59.
(4) 61 L. T. 302.

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over twenty years ago; and the facts shew that, in all human probability, he is dead. I, therefore, grant the present application without requiring him to be cited; and I do so upon the authority of *In the Goods of Callicott* (1) and *In the Goods of Reed* (2), upon the applicant swearing that he believes himself to be the next of kin of the intestate. The grant will, of course, be made under s. 73 of the Probate Act, 1857, in the usual way.

Solicitor: *H. Coulson, for W. Walker, Bradford.*

H. D. G.

*Distinguished.* GREEK GOVERNMENT *v.* MINISTER OF TRANSPORT. THE ILISSOS. [1948] 1 All E.R. 904.

[IN THE COURT OF APPEAL.]

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*July* 15.

*Distinguished.* RYL. GREEK GOVT. *v.* MIN. OF TRANSPORT. [1949] 1 K. B. 7

## THE TORBRYAN.

*Admiralty—Damage to Cargo—Negligence of Stevedore in Discharge—Charterparty—Construction of Exceptions—"All other Accidents"—"Negligence of Servants . . . . in the Management or Navigation of the Vessel or otherwise."*

Sugar in bags was shipped under a charterparty exempting the shipowner from liability for loss or damage arising from the usual perils "and all other accidents even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors or other servants of the owner in the management or navigation of the vessel or otherwise."

In the process of discharge stevedore's men, employed by the ship, recklessly used hooks which tore the bags, and carelessly allowed the bags to be cut by the slings and to burst through striking against the hatchcoamings whilst being lifted out of the hold. In an action by the charterers for damage to, and short delivery of, the sugar:—

*Held*, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), affirming the decision of Phillimore J., [1903] P. 35, that the shipowner was not liable, as the loss was covered by the exception "accidents . . . . caused by negligence . . . . of the servants of the owner" "otherwise" than "in the management or navigation of the vessel."

APPEAL by plaintiffs, Piettre Frères, of Paris against a decision of Phillimore J. (3) holding the defendants, the

(1) [1899] P. 189. (2) 29 L. T. 932.

(3) Reported ante, p. 35.

owners of the *Torbryan*, not liable for damage to, and short delivery of, a cargo of sugar.

The facts, so far as material, were as follows :—

The plaintiffs shipped on board the defendants' steamship *Torbryan* at Dunkirk, for delivery in London, 796 tons of sugar in bags, under bills of lading, incorporating a charterparty in the French language, the negligence clause of which, according to an agreed translation, ran :—

" Act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates or robbers, strikes, arrests or restraints of princes, rulers, and peoples, collisions, stranding, and all other accidents excepted, even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors or other servants of the owner, in the management or navigation of the vessel or otherwise."

The vessel left Dunkirk on February 5, 1902, and arrived in the Thames on the following day, where she was moored to buoys off the Free Trade Wharf, London, and on February 7 to 12 her cargo was discharged into lighters by stevedores employed by the ship.

In the course of discharge the marks of the various parcels were found to be mixed up, involving a considerable amount of shifting and turning over of bags, and reports were from time to time made by the lightermen who received the parcels of cargo deliverable in their respective barges at various wharves that the cargo was being roughly handled, and, in particular, that by the reckless use of hooks the bags were torn so that the dry granulated sugar ran out, and that further spilling of sugar was caused by the bags being cut by the slings, and by the seams bursting through striking against the hatch-coamings whilst being lifted out of the hold. Complaints based on these reports were made during the discharge by the agents of the consignees to the agents of the shipowners.

The action by the charterers against the shipowners for breach of contract was tried on December 3, 1902, and, on December 8, in giving judgment for the defendants, Phillimore J. said : " The cargo was brought over in sufficient bags. Some were torn in the sides by hooks which the stevedores improperly and

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recklessly used in the course of discharge. Some were cut through from below by the slings owing to the sets being violently knocked from underneath against the deck or the coamings of the hatch in the course of their being carelessly lifted out of the hold. It is possible that in a few cases the bags burst at the seams through the same violent contact. From the holes and at the burst seams fine crystallized sugar spilt in the process of moving. Some was saved clean and put back into the bags, some was saved in a damaged condition and sold for an inferior price as sweepings, and a good deal was lost. The net loss was properly put by the plaintiffs at 158*l.* 2*s.* 8*d.*, and they properly spent 7*l.* 19*s.* 5*d.* in repairing the bags and thus saving further loss. The acts and omissions of the stevedores which caused these losses were negligent and improper; the stevedores were the servants of the shipowner, and he is responsible to the plaintiffs unless he is protected by the charterparty. [The learned judge then referred to the material clause of the charterparty already set out, and continued:—] The defendants contend that the loss sued for is upon the facts which I have found to be considered to be due to an 'accident' 'caused by negligence of servants of the owner' 'otherwise' than 'in the management or navigation of the vessel.'" The learned judge then dealt with the word "otherwise," which he held referred to the receiving and delivery of the cargo; and with regard to the words "accident caused by negligence," he held that the damage caused to the bags by striking against the deck or hatch-coamings, though due to careless working, was accidental. As regarded the damage caused by the hooks, "the use of such hooks as were used was wrongful, and was likely to be injurious; but it did not follow that the hooks each time they were used tore one of the bags . . . . there was a loss by accident, the spilling, caused by another accident, the tearing, due to negligence in shifting the bags with hooks. In this way I arrive at a double accident in the chain of consequences in each case; but a single accident is sufficient for the defendants." With regard to the contention that the persistence of the stevedores in their improper working after warning removed the subsequent

mischiefs from the category of accidents, the learned judge said: "The stevedores were reckless, and it may be said wanton, but they were not wilful. They did not intend to damage or destroy; they intended to hurry over the discharge, and to take their chance of doing or not doing damage. They handled many bags without damaging them. Others were damaged, and as each bag was damaged it was an accident, though no doubt not an unlikely one. There must be judgment for the defendants."

July 10, 15. *Scrutton, K.C.*, and *Balloch*, for the appellants (plaintiffs), the charterers and owners of the cargo. The learned judge in the Court below has found that the use of the large "can" hooks was wrongful. The evidence is that the men recklessly used these hooks, which belonged to them, to forcibly drag the bags out and make up the "sets" in the ship's hold instead of using the smaller hooks which are supplied to them, and with which they can take hold of the lug of the bag without injuring it. This wrongful user necessarily tore the bags and was persisted in after warning. So in hoisting the bags in sets out of the hold, instead of the gangway man guiding the chain clear of the hatch, the whole set was carelessly allowed to catch underneath the deck or to strike the coamings, thereby cutting the bags and spilling the sugar. In neither case can the resulting loss be deemed accidental, for it was the inevitable consequence of the act.

The clause in question in this case, and upon which the respondents rely, is not in the ordinary bill of lading form excepting the stevedore's negligence; but is worded, "accidents excepted even though caused by negligence." It is, therefore, necessary for the shipowner to shew that the loss was due to an "accident." If, however, a bag of sugar is hoisted up with a large hole in it, the sugar will run out by the law of gravitation. It is not an accident, for it can be foreseen that that will happen. In *Hamilton* v. *Pandorf* (1) Lord Halsbury L.C. says: "I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'" In

(1) (1887) 12 App. Cas. 518, at p. 524.

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*Fenwick* v. *Schmalz* (1) the charterers were held liable for a delay caused by snow, that not being an accident within the clause, "any other accidents beyond their control which might prevent or delay the loading."

[They also referred to *Grill* v. *General Iron Screw Colliery Co.* (2)]

*Carver, K.C.*, and *A. E. Nelson*, for the respondents (defendants), the owners of the *Torbryan*. The stevedores' men did not wilfully put the hooks into the bags for the purpose of tearing them. They used the hooks to effect quick despatch, to enable them more easily to handle the bags, and drag them from underneath other bags in the process of sorting the different marks for delivery over the side into the craft which were waiting for different parcels of sugar. In pulling out the bags with hooks in order to get at the right marks, they could not always take hold of the bag by the lug. In many cases the operation was successfully conducted, and no loss resulted; in other cases bags were torn, and then it was an accident.

The exceptions in the charterparty apply to acts of negligence in the discharge of the cargo as well as to negligence in the navigation of the ship, that is to say, the exception extends to acts of the stevedore employed by the ship, as in *Baerselman* v. *Bailey* (3), where the exception ran: "Any act, negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship or otherwise." This was held to cover negligent stowage by a stevedore employed by the shipowner. In *The Cressington* (4) "perils of the sea and other accidents of navigation, even when occasioned by the negligence of the master," were excepted. The master negligently omitted to take sufficient steps to stop a leak, and it was held that the shipowner was not liable either for the original source of damage to the cargo, or for the damage arising from the continuance of the leakage not being prevented; for the inflow of water being a peril of the sea and an accident of navigation, the negligence of the

(1) (1868) L. R. 3 C. P. 313.
(2) (1868) L. R. 3 C. P. 476.
(3) [1895] 2 Q. B. 301.
(4) [1891] P. 152.

master in respect of it was covered by the exception. In that case the master knew of the leak, and that the natural and inevitable result would be that more water would come in; but the shipowner was protected on the ground that the loss was due to an accident of navigation occasioned by negligence within the terms of the exception.

In *Blackburn* v. *River Plate Navigation Co.* (1) the shipowner was held not liable for damage to goods by sea-water caused by the negligent mistake of the engineer in opening the wrong valve, the exception in that case being—loss or damage arising from peril of the seas or navigation, whether from the negligence, default, or error of judgment of the engineers or otherwise howsoever. The argument on behalf of the plaintiff cargo owner was that the damage was not caused by a peril of the seas, because the incursion of the sea-water was not an accident or peril at all, for it was intentionally introduced into the ship, though by mistake it was let into the wrong tank; but Walton J. in his judgment, after referring to *Hamilton* v. *Pandorf* (2) as the example most applicable, says that though there must in the first place be an accident, that is, "that the loss must be something which might, and not necessarily must follow," yet it is "a fallacy to say that because the loss was caused by mistake or neglect on the part of a servant it was therefore not an accident," for "damage arising from the negligence of a servant is an accident or casualty."

[COLLINS M.R. It is argued against you that, where you have stevedore's men using means certain to destroy the bags, it is not an accident.]

It may be an accident as against the shipowner employing the stevedore's men, and as against him it would still be an accident or casualty, though the men persisted in using hooks after the stevedore warned them to desist.

[They referred to *The Xantho.* (3)]

*Balloch*, in reply. On the facts of this case the loss was not due to an accident, for it was obvious what the result must be

(1) [1902] 1 K. B. 290, at p. 295. (2) 12 App. Cas. 518.
(3) (1887) 12 App. Cas. 503.

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when no notice was taken of the complaints, made after the first day the discharge began, as to the mode of handling the bags. In the case of *The Cressington* (1), relied on by the respondents, the master did take steps by using cement to stop the leak; so that it could not be foreseen that further damage would result owing to his having negligently omitted to take sufficient steps. So in *Blackburn* v. *River Plate Navigation Co.* (2) the engineer intended to open the right valve, but by mistake opened the wrong one.

It is submitted that the correct mode of reading the clause in the charterparty is to pause after the word "peoples" as if a semicolon were inserted, and then treat the words "all other accidents excepted" as applying to collision and stranding—that is to say, to matters of navigation. It will then be clear that if it had been intended to cover the case of loss or damage to the cargo during the discharge it would have been necessary to add proper words to the exceptions, for, in the case of ambiguous phraseology, the construction most advantageous to the shipowner will not be adopted: *Owners of Cargo on board SS. Waikato* v. *New Zealand Shipping Co.* (3)

COLLINS M.R. The point in this case is whether the defendant, the shipowner, is protected by a clause in the charterparty to this effect: "Act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates or robbers, strikes, arrests or restraints of princes, rulers, and peoples, collisions, stranding, and all other accidents excepted, even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors or other servants of the owners in the management or navigation of the vessel or otherwise." What happened was that, in the process of unloading, the stevedores' men used, in a very reckless manner, hooks, called can hooks, in the course of the discharge of the cargo of sugar which was in bags.

If these hooks are used recklessly, it is exceedingly probable that the bags will give way, and that a considerable amount of

(1) [1891] P. 152. (2) [1902] 1 K. B. 290.
(3) [1899] 1 Q. B. 56.

damage may be done to the cargo. The other parts of the claims made by the owner of the cargo seem only to have arisen out of the ordinary accidents of unloading when the bags are being lifted out of the hold until they are in a position for passing over the rail on to the wharf.

There is evidence of remonstrance made by the cargo owners, and also by persons representing the stevedores, and that notwithstanding that remonstrance the men continued to use these hooks, and so damage was done to the cargo. The point is whether damage arising in that way by the negligence of these men was damage covered by this clause. I agree with the learned judge in the Court below that it does come within that part of the clause commencing with "All other accidents excepted." In order to arrive at the meaning of the word "accidents" here it is necessary to look at the contract between the parties, and so ascertain what in these provisions are meant to be excepted. Now in this case the contract is between the shipowner and the cargo owner, and they have thought it right to provide that the shipowner is to be excused from the numerous list of possible occurrences (including barratry) which I have read, all of which they have swept into the category of "accidents." Looking at it from that standpoint, it is an accident to him, a fortuitous and unexpected occurrence, that the persons employed in unloading the cargo should resort to such reckless means, and even though it is something more than recklessness, nevertheless I think it might, notwithstanding, be an accident covered by the clause. In that view it seems to me the judgment of the learned judge is right.

MATHEW L.J. I am of the same opinion. I think that the right way to look at this clause is to regard it as the language of the shipowner and of the charterer. From that point of view it is obvious that the words are used in their popular sense. The exceptions named are: "Act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates or robbers, strikes, arrests or restraints of princes, rulers, and peoples, collisions, stranding, and all other accidents

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excepted." All these acts are to be treated as accidents; but an ingenious attempt has been made on behalf of the appellants to get rid of the word "accident" in connection with the earlier perils enumerated, and by inserting a semicolon to make the words "and all other accidents" apply only to cases of the description of collisions and stranding, that is, treating the word "excepted," which comes at the end of that paragraph, as applying only to accidents in respect of matters relating to navigation, and it is said that it is clear that that is the correct mode of reading the clause by reason of the words that follow: "Even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors or other servants of the owners in the management or navigation of the vessel or otherwise."

In my opinion this clause will not bear any such interpretation, and I think that it protects the shipowner in respect of the claim in this action. I cannot follow the argument of the appellants, which would lead to the inference that whenever negligence is shewn then what follows is an inevitable consequence not to be regarded as an accident.

COZENS-HARDY L.J. concurred.

*Appeal dismissed.*

Solicitors for appellants (plaintiffs): *Hollams, Sons, Coward & Hawksley.*

Solicitors for respondents (defendants): *Lowless & Co.*

T. L. M.

[IN THE COURT OF APPEAL.]

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## THE CAYO BONITO.

*Admiralty—Collision—Compulsory Pilotage—Exemption—London District—"Constant Trader"—Ship carrying Passengers—Pilotage Act*, 1825 (6 *Geo.* 4. *c.* 125), *s.* 59—*Order in Council, February* 18, 1854—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 603.

A British steamship company ran two lines, one from London to Antwerp and then on to America and back, the other from London to New Orleans direct, with liberty to call at Bermuda, and their vessels were employed on either line according to convenience. A new vessel belonging to the company had made one voyage from London viâ Antwerp to Mexican ports, and was proceeding from London in charge of a duly licensed Trinity House pilot, with cargo and one passenger, on a second voyage for the same round, when she came into collision with the plaintiffs' vessel in the estuary of the Thames. In an action of damage by collision brought by the plaintiffs against the defendant company, the pilot of the defendant company's vessel was found alone to blame; but the defendants failed to sustain their plea of compulsory pilotage:—

*Held*, by the Court of Appeal (Collins M.R., Mathew, and Cozens-Hardy L.JJ.), affirming the decision of Gorell Barnes J., [1902] P. 216, that the defendants were liable, as their vessel was exempt from compulsory pilotage, being a "constant trader" between London and ports on the Continent north of Brest, within the meaning of the exemption in s. 59 of 6 Geo. 4, c. 125, supplemented by the Order in Council, February 18, 1854, and kept alive by s. 353 of the Merchant Shipping Act, 1854, for which s. 603 of the Merchant Shipping Act, 1894, is now substituted.

*The Earl of Auckland*, (1862) 15 Moo. P. C. 304, held binding and followed.

APPEAL by defendants, the owners of the *Cayo Bonito*, against a decision of Gorell Barnes J. (1) holding, in an action of damage by collision brought by the plaintiffs, the owners of the *British Prince*, that the defendants' plea of compulsory pilotage had not been sustained.

The case turned on the meaning to be attached to the words "constant trader" in the statutory exemptions from compulsory pilotage in the London district.

The facts, so far as material, were shortly as follows:—

The appellants (defendants), the Cuban Steamship Company,

(1) [1902] P. 216.

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run two lines of steamers, one from London viâ Antwerp to America and back, the other from London to New Orleans direct, with liberty to call at Bermuda, and they employ their vessels on either line according to convenience.

The *Cayo Bonito* is a new steamship of 3427 tons gross register belonging to the port of London, and owned by the appellant (defendant) company. She had made one voyage from London viâ Antwerp to Mexican ports, and on the night of February 8, 1902, she was again proceeding from London to Coatzocoalcas in Mexico, viâ Antwerp, Havana, and Vera Cruz, with a part cargo of 800 tons, one passenger, and a duly licensed Trinity House pilot, when she came into collision, in the Duke of Edinburgh Channel, in the estuary of the Thames, with the respondents' (plaintiffs') steamship *British Prince*, inward bound. Both vessels sustained considerable damage.

By their defence to the action brought by the owners of the *British Prince*, the owners of the *Cayo Bonito* pleaded in the alternative that "if the said collision was caused or contributed to by any of those on board the *Cayo Bonito*, which they deny, it was solely caused or contributed to by the neglect or default of a qualified pilot, who was then in charge of the *Cayo Bonito*, and whose employment by the defendants was compulsory by law, and for whose acts, neglects, or defaults the defendants were not liable."

At the trial of the action on March 25, 1902, before Gorell Barnes J., assisted by two of the Elder Brethren of the Trinity House, the pilot of the *Cayo Bonito* was found alone to blame for the collision, the question of law whether the pilotage was compulsory being reserved. After argument on April 10, and further evidence, taken on June 9, as to the nature of the voyages of the *Cayo Bonito*, the learned judge on June 19, in a considered judgment, reviewing the legislation and decisions on the subject (1), held that the employment of the pilot on board the *Cayo Bonito* at the time and place of the collision was not compulsory by law, on the ground that though pilotage was compulsory in the district in question under s. 622 of the

(1) [1902] P. 216, at pp. 218–32.

Merchant Shipping Act, 1894 (1), the *Cayo Bonito* was exempt by reason of the terms of s. 59 of the Pilotage Act, 1825 (2), supplemented by the Order in Council of 1854 (3), and kept alive by s. 603 (4) of the Merchant Shipping Act, 1894.

In addition to the Order in Council and the above-mentioned statutes, the learned judge referred to and, so far as material, set out the words of (1732) 5 Geo. 2, c. 20, s. 1; (1808) 48 Geo. 3, c. 104, s. 2; (1812) 52 Geo. 3, c. 39, s. 2; (1853) 16 & 17 Vict. c. 129, s. 21; Order in Council, December 21, 1871; (1897) 60 & 61 Vict. c. 61. The following cases were also referred to in the judgment: *Reg.* v. *Stanton* (5); *The Earl of Auckland* (6); *The Wesley* (7); *The Hanna* (8); *The Vesta* (9); *Courtney* v. *Cole* (10); *The Rutland.* (11)

1903. July, 9, 10. *Asquith, K.C., Laing, K.C.,* and *Balloch,* for the appellants (defendants), owners of the *Cayo Bonito.* The question is whether the pilot, who was in fact in charge of

(1) 57 & 58 Vict. c. 60, s. 622: "Subject to any alterations to be made by the Trinity House, and the exemptions under this Part of this Act, pilotage shall be compulsory within the London district, and the Trinity House outport districts."

(2) 6 Geo. 4, c. 125, s. 59: "Notwithstanding anything in this Act contained, the master of any . . . . constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers and coming up either (?) by the North Channel, but not otherwise) . . . . shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel . . . ."

(3) Order in Council, February 18, 1854: "The masters of the undermentioned ships and vessels shall, subject to the provision contained in the 59th section of the Act of Parliament, 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage, viz.: Of ships and vessels trading to . . . . ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the south passages."

(4) 57 & 58 Vict. c. 60, s. 603: "(1.) Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers herein-before contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act; but all exemptions from that compulsory pilotage shall continue to be in force."

(5) (1857) 8 E. & B. 445.

(6) (1861) Lush. 164, 387; (1862) 15 Moo. P. C. 304.

(7) (1861) Lush. 268.

(8) (1866) L. R. 1 A. & E. 283.

(9) (1882) 7 P. D. 240.

(10) (1887) 19 Q. B. D. 447.

(11) [1897] A. C. 333.

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the *Cayo Bonito* at the time of the collision, was employed by compulsion of law. The learned judge in the Court below has found that pilotage was not compulsory, and, therefore, that the owners of the *Cayo Bonito* are not relieved of liability for the damage sustained by the *British Prince*. It is submitted that the decision is wrong on two grounds—first, that the Order in Council upon which the case turns has been displaced by subsequent legislation; and, secondly, that, assuming the existence of the exemption provided for in that order, the *Cayo Bonito* did not fall within that exemption.

In the judgment the origin of the exemption in question is traced to the saving clause in s. 2 of 48 Geo. 3, c. 104, in respect of "constant traders inwards" being British vessels from ports between Boulogne, inclusive, and the Baltic, and the learned judge infers that the intention at that time was to exonerate ships coming inwards from the ports mentioned to London having British registers, so as to favour British ships as against foreigners. Admitting that that may be so, the appellants contend that the system existing under that statute as consolidated by the Pilotage Act of 1825 (6 Geo. 4, c. 125) was a system of pilotage based on preferential treatment towards particular trades, and that it was replaced by an entirely different system for the Trinity House district, based on the necessity for the preservation of life. That change was effected by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), an amending and consolidating statute which received the Royal assent on August 10 of that year, and came into operation on May 1, 1855. It was followed the day after—that is, August 11, 1854—by the Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120), by which the whole of 6 Geo. 4, c. 125, was repealed as from the date of the coming into operation of the Merchant Shipping Act, 1854, together with, amongst other sections, s. 21 of the Pilotage Law Amendment Act, 1853 (16 & 17 Vict. c. 129), a section recited by the Order in Council of February 18, 1854, upon which the respondents are relying, and under the authority of which section that Order in Council was made.

In the Merchant Shipping Act, 1854, the application of

Part V., headed "Pilotage," is, by s. 330, restricted to the United Kingdom, and, by s. 331, pilotage authorities only retain their powers so far as consistent with the provisions of the Act. By s. 332 power is given to pilotage authorities to make and extend exemptions from compulsory pilotage, and, by s. 353 (reproduced in s. 603 of the Merchant Shipping Act, 1894), subject to any alteration made under the powers conferred by s. 332, "all exemptions from compulsory pilotage then existing within such districts shall continue in force." These exemptions are alleged to be those contained in 6 Geo. 4, c. 125, which was the Pilotage Act in force at the time the Merchant Shipping Act, 1854, came into operation, and this is so stated in the judgment of Dr. Lushington in *The Earl of Auckland* (1); but the Act of 6 Geo. 4 and s. 21 of the 16 & 17 Vict. having been repealed as from August 11, 1854, it cannot be contended that the special exemptions relied on were kept alive by this section, which was a general section applying to the whole pilotage system and to be read in conjunction with the special provisions contained in subsequent sections, as, e.g., s. 370, which gives the Trinity House the power to license pilots for the London district, the English Channel district, and the Trinity House outport districts, whilst by s. 376 the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, "subject to the exemptions hereinafter contained," are declared to be the London district and the Trinity House outport districts, and by s. 379 ships trading to Boulogne or to any place in Europe north of Boulogne, together with other ships classed in s. 59 of 6 Geo. 4, are, "when not carrying passengers," exempted from compulsory pilotage in the London district and in the Trinity House outport districts—that is to say, the exemption is confined to cargo vessels, whether British or foreign, the object of the new system being the protection of life; so that there is here a distinct alteration applying to this particular district, and no room under the policy thus inaugurated for an exemption applying to British ships only whether carrying passengers or not, the result being that s. 353 of the Merchant

(1) Lush. 164, at p. 177.

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Shipping Act, 1854, kept alive compulsory pilotage and exemptions in those districts which were not dealt with specially by that Act, and where the pilotage authorities derived their powers from Acts of Parliament or charters which were not repealed on the passing of that Act, whilst compulsory pilotage and exemptions therefrom in the district in question were specially provided for and enforced by penalties by the Merchant Shipping Act, 1854, and under that Act, as the *Cayo Bonito* carried one passenger, she would have been bound by compulsion of law to take a pilot.

It is true that in *Reg.* v. *Stanton* (1) a vessel carrying passengers from London to Copenhagen was held exempt under s. 59 of 6 Geo. 4, c. 125, notwithstanding the special exemptions in s. 379 of the Merchant Shipping Act, 1854, applicable to ships on such a voyage when not carrying passengers; but, as, in that case, it was conceded in argument that s. 353 continued the exemptions in s. 59 of 6 Geo. 4, it is submitted that that decision is no authority on the point and should be overruled, as well as the case of *The Earl of Auckland* (2), in which the Judicial Committee of the Privy Council did little more than follow the earlier case, and held that a British vessel carrying goods and passengers between Rotterdam and London was exempt from compulsory pilotage. As pointed out in argument by the appellants in that case (3), the true interpretation of the statute is given in *The Temora* (4), where a vessel was held bound to employ a pilot under s. 354 of the Merchant Shipping Act, 1854 (now s. 604 of the Merchant Shipping Act, 1894), whilst carrying passengers from London to Belfast, although she would have been exempt under s. 59 of 6 Geo. 4, c. 125, as an Irish trader using the navigation of the Thames.

Secondly, on the facts it is submitted that the *Cayo Bonito* does not fall under the term "constant trader." It is difficult to discover the policy of the Legislature, but the reasonable inference is that the word "trading" was used with the view of encouraging trading with particular markets by British

(1) 8 E. & B. 445.
(2) 15 Moo. P. C. 304.
(3) 15 Moo. P. C. at p. 307.
(4) (1860) Lush. 17.

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vessels constantly passing backwards and forwards on short distance voyages—that is to say, favour was shewn where it was the regular business of the ship to proceed from the port of London to the Continent, within the defined area, and not as in the case of the *Cayo Bonito* to go to Antwerp to load up for ports in some distant part of the world. It was only the second voyage of this vessel, and she was constructed and equipped, not for a short voyage, but for a transatlantic voyage in which she might or might not call at Antwerp according to the exigencies of the line of steamers to which she belonged. A vessel whose main business it is to carry goods to America cannot be deemed a constant trader to Antwerp, for she does not begin her real trading voyage until she leaves Antwerp. No doubt in *Courtney* v. *Cole* (1) a British ship was held to be exempt from compulsory pilotage on the ground that she was "trading from London to a place north of Boulogne," within s. 379 of the Merchant Shipping Act, 1854, though she was one of a line of vessels making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London; but the decision is not applicable to the present case as she was not carrying passengers, and the judgments in that case do not meet the difficulty that the word "constant" is used in s. 59 of 6 Geo. 4, c. 125, and if the exemptions are to be kept up under the Order in Council then that word is essential.

In *The Rutland* (2) a British ship laden with cargo from the River Plate for Rotterdam and cattle for London discharged the cattle in London, and was proceeding with her cargo to Rotterdam without having loaded any more cargo in London. She was held to be exempt from compulsory pilotage on the ground that she was "trading" from London to Rotterdam within s. 625, sub-s. 3, of the Merchant Shipping Act, 1894; but she was not carrying passengers, and the case does not affect the question that the word "constant" must be imported if s. 59 of 6 Geo. 4, c. 125, is to be deemed still in force; and in his judgment the learned judge in the Court

(1) 19 Q. B. D. 447. (2) [1897] A. C. 333.

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below admits that these two cases do not determine the question involved in this case—namely, what is a "constant trader."

*Aspinall, K.C.*, and *Dawson Miller*, for the respondents (plaintiffs), owners of the *British Prince*. On the part of the respondents it is contended that the exemption from compulsory pilotage given by 6 Geo. 4, c. 125, and extended by the Order in Council of February 18, 1854, is continued by s. 353 of the Merchant Shipping Act, 1854, for which s. 603 of the Merchant Shipping Act, 1894, is now substituted, and that the exemption so retained is not limited by ss. 376 and 379 of the Merchant Shipping Act, 1854, for which ss. 622 and 625 of the Merchant Shipping Act, 1894, are now substituted. That the exemptions under s. 59 of the Pilotage Act, 1825, as extended by the Order in Council, are in force is rendered clear by the action of the Legislature in passing the Merchant Shipping (Exemption from Pilotage) Act, 1897 (60 & 61 Vict. c. 61), for the purpose of removing certain of those exemptions from compulsory pilotage. By s. 1 it is enacted that s. 603 of the Merchant Shipping Act, 1894, "so far as it continues the exemptions granted by s. 59 of 6 Geo. 4, c. 125, and extended by the Order in Council of February 18, 1854, and the said Order in Council, shall cease to operate in the case of vessels on voyages between any port in Sweden or Norway and the port of London."

This implies the existence under the Act and order mentioned of exemptions other than those abolished, and indirectly affirms the view, taken in *The Earl of Auckland* (1), that s. 353 of the Merchant Shipping Act, 1854, continued the exemption existing under 6 Geo. 4, and extended by the Order in Council. In that case all the arguments now urged by the appellants in this case—as to the inconsistency of assuming the continuance of s. 59 of the Pilotage Act, 1825, and of the Order in Council, in the face of s. 379 of the Merchant Shipping Act, 1854, for which s. 625 of the Merchant Shipping Act, 1894, is substituted—were urged before the Judicial Committee of the Privy Council, but without effect, and this Court will

(1) 15 Moo. P. C. 304.

hardly overrule a case decided as long ago as 1862 by the final appellate tribunal in Admiralty, whose jurisdiction was by s. 18 of the Supreme Court of Judicature Act, 1873, transferred to this Court.

The second question is, Was this ship "trading" within the meaning of the Order in Council? It is not necessary to insert the word "constant," for that order was advisedly made by way of extending the existing exemptions. It is true that in *The Vesta* (1) Sir Robert Phillimore uses expressions which imply that, so far as the Order in Council relates to exemptions, it is subsidiary to, and explanatory of, s. 59 of the Pilotage Act, 1825; but the only point the learned judge had to decide in that case was whether foreign vessels were included. The Order in Council is headed, "Regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of s. 59 of the Act 6 Geo. 4, c. 125 . . . . pursuant to the provisions of s. 21 of the Act 16 & 17 Vict. c. 129," which was an Act further to amend the law relating to pilotage, and it is submitted that the question has been authoritatively settled by the cases of *Courtney* v. *Cole* (2) and *The Rutland* (3), which cover this case in respect of the meaning to be attached to the word "trading"; but if it should be deemed necessary to bring in the words used in s. 59 of the Pilotage Act, 1825, namely, "constant trader," then it is contended, in the language of the learned judge in the Court below, that the *Cayo Bonito* is included, for these words are, "used in a business sense of a vessel which is regularly engaged in the trade, but not so absolutely constantly going backwards and forwards that there is never any possible departure from that going backwards and forwards between the Continent and London." In support of this view the learned judge relies upon the language, to the same effect, of the late Master of the Rolls in *Courtney* v. *Cole* (2), and sums up the matter in the sentence, "if it is part of the regular business of a ship to proceed from the port of London to the Continent, between the limits mentioned, she is, within the meaning of the section

(1) 7 P. D. 240. (2) 19 Q. B. D. 447.

(3) [1897] A. C. 333.

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and the Order in Council, a 'constant trader,' and, therefore, exempt from the compulsion to take a pilot."

*Asquith, K.C.*, in reply. The arguments of the respondents do not get over the difficulty that, if the exemption relied on exists under s. 603 of the Merchant Shipping Act, 1894, by virtue of the Pilotage Act, 1825, and the Order in Council, then the provisions of s. 625 of the Merchant Shipping Act, 1894, are unnecessary and misleading, for the important qualification that the exemption only applies when the ship is not carrying passengers is ignored.

The Merchant Shipping (Exemption from Pilotage) Act, 1897, does not involve the inference contended for by the respondents, as it only proceeds, ex abundanti cautelâ, to abolish certain exemptions, about the existence of which there may have been doubts, the object being to place foreign ships on the same footing as British ships when carrying passengers between London and Norway or Sweden.

To constitute a vessel a "constant trader" she must at any rate have been placed by her owners on the route, that is, the act of proceeding to a Continental port within the prescribed area must be an habitual incident of her trading, whereas in this case the *Cayo Bonito* might be employed on the other of the two lines run by the defendant company, and so not go to Antwerp at all.

COLLINS M.R. This is an appeal from a decision of Gorell Barnes J., who has held in the case of a collision between the *British Prince* and the *Cayo Bonito* that the collision was entirely due to the negligence of the pilot of the *Cayo Bonito*.

If pilotage was compulsory, the owners are not liable; and, therefore, the question which was argued in the Court below, and raised again on this appeal, is whether or not pilotage was compulsory. The learned judge, after careful consideration and an elaborate examination of the statutes and authorities bearing on the matter, has come to the conclusion that pilotage was not compulsory, and, therefore, finds that the owners are liable for the consequences of the collision.

Now the case turns on a lengthy examination of the authorities; but it has been narrowed down for us by the able and concise arguments which have been addressed to us on both sides, and I do not propose, therefore, for my part, to enter upon a discussion on the many points upon which the learned judge, with great advantage and assistance to this Court, embarked.

There is no doubt that primâ facie pilotage is compulsory in these waters. That, as was pointed out by Gorell Barnes J., is expressly provided by s. 622 of the Merchant Shipping Act, 1894, and s. 603 of the same Act enacts that, "Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act." That takes us back to the 59th section of 6 Geo. 4, c. 125, for I do not think it necessary, for my purpose, to go beyond that consolidating statute.

The vessel in question was upon a voyage which is described in the judgment of Gorell Barnes J. in these words: "The *Cayo Bonito* is a large vessel belonging to the port of London, and, at the time of the collision between her and the *British Prince*, she was on a voyage from London to Antwerp, and then from Antwerp to Coatzacoalcas, in Mexico, Havana, and Vera Cruz, with about 800 tons of cargo on board and one passenger, and it was in the course of her passage from London to Antwerp that the collision took place."

Now under the provisions, so far as material, of s. 59 of the Act of George IV. the masters of the following vessels are exempt from compulsory pilotage, namely: "The master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive, and the Baltic (all such ships and vessels having British registers, and coming up either by the North Channel but not otherwise) . . . . or of any ship or vessel employed in the regular coasting trade of the kingdom." Next comes the statute of 1853, 16 & 17

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Vict. c. 129, s. 21. By that Act the proper authority was enabled by Order in Council to enlarge the exemptions at that time existing, and accordingly an Order in Council was made consolidating the regulations for the exemptions from compulsory pilotage then existing under the provisions of s. 59 of 6 Geo. 4, and that order contains two paragraphs. First, there is the exemption from compulsory pilotage of ships and vessels trading to Norway and the Cattegat or Baltic, or round the North Cape, or into the White Sea, when going up by the south channels. That is an exemption including the south as well as the north channel. The second paragraph extends the exemption to ships and vessels trading to ports between Boulogne inclusive and the Baltic on their outward passages, and when coming up by the south channels. Thus were added outward to inward, and south to north channels, and that is the joint result of the statute and the Order in Council. If that exemption exists still, notwithstanding subsequent legislation, it would cover the case of a vessel which could bring itself within its terms.

In this case, subject to questions of fact, the contention is that the voyage was one within the meaning of the terms "vessels trading to ports between Boulogne inclusive and the Baltic on their outward passages." Now this vessel was undoubtedly engaged in a passage from London to Antwerp. She proposed to do a great deal more when she got to Antwerp; but the question is whether the exemptions included such a voyage under such conditions as we have here, and, if so, has the exemption granted by the Act of George IV. and the Order in Council been preserved, or has it been annulled? The argument for the appellants is that the subsequent statute—the Merchant Shipping Act, 1854—did in point of fact abolish that exemption and substitute other enactments in its place. That argument, I think, would have been very powerful if it had not, as it has, in my opinion, been precluded by authority. It is strongly argued that the exemption is preserved in the 353rd section in these terms: "Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the

employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation, and all exemptions from compulsory pilotage then existing within such districts shall continue in force." That primâ facie contains certain exemptions from compulsory pilotage, and it is headed by the words, "Compulsory Pilotage: General"; but that is followed by another group of sections, 376 to 379, headed, "Compulsory Pilotage: Trinity House"; and counsel for the appellants, in an able argument, has pointed out that the 379th section of that statute included, in fact in terms, the very same provisions that are contained in the 59th section of the earlier Act constituting the exemptions; that they are re-enacted, but re-enacted with a difference, and the section limits the exemptions to the cases of ships not carrying passengers, whereas the former exemption in the earlier statute did not contain that condition. The argument comes to this: Can you in one and the same statute have a provision which puts vessels carrying passengers outside the exemption, and a subsequent provision which re-enacts the provisions then existing? That argument would be well worthy of consideration if, as it seems to me, it had not already been discussed first of all in the case of *Reg.* v. *Stanton* (1)—which decided that the two were not incompatible, and that the earlier provision of exemption did continue to exist in a vessel that was carrying passengers, and afterwards in *The Earl of Auckland* (2)—which adopted and followed it—and was confirmed on appeal to the Privy Council. (3) That was as far back as 1862; and even if that decision of the Privy Council, the then final Court of Appeal in Admiralty matters, is not in the strictest sense binding upon us, yet after this interval of time I do not think that we should be at liberty to depart from it. It is not necessary to decide whether it is, formally and technically, binding upon us in the same sense as a decision of the House of Lords would be, though my impression is that it is; and when the position is that the law has been declared by the

(1) 8 E. & B. 445.

(2) Lush. 387.

(3) 15 Moo. P. C. 304.

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highest tribunal more than forty years ago, and has been acted upon since, I do not think we should be justified in departing from it. But it does not rest there, for the later statute of 1897 has, I think, practically established the view taken in those cases; that is to say, it has adopted the view that the earlier exemptions and those in the Order in Council are in existence, and treats them as still in existence, though to a certain extent modified. Accordingly I think that, with regard to the main part of the argument, the authorities, followed by the Legislature, have decided against the contention of counsel for the appellants, and that those cases and statutes lead to the conclusion that, notwithstanding subsequent legislation, the exemptions of the Order in Council based upon the 59th section of the Act of George IV. still exist.

With regard to the question, partly of fact and partly of law, whether this particular ship comes within the exemption, counsel for the appellants, in arguing to the contrary, are obliged to contend that the exemption does not extend to the case unless the ship can be described as a "constant trader," and they say that the exemption referring to that condition was not applicable in this case, because this particular vessel had only made one voyage, and was beginning the second at the time when she came into collision with the plaintiffs' vessel, and therefore they say it cannot be contended that such a vessel was a "constant trader." They also raise other points—whether, for instance, she was a trader at all in the sense of the exemption; but that is the main point, and it rests upon this: In the 59th section of the Act of George IV. are these words: "Notwithstanding anything in this Act contained, the master of any . . . . constant trader inwards from the ports between Boulogne inclusive and the Baltic"—shall be exempted from compulsory pilotage. Now it is said that that provision in favour of the constant trader is really the same provision which was adopted, with certain enlargements, in the Order in Council; that in the two paragraphs of the order ships and vessels constantly trading is meant; and that that meaning is to be imported into the words of the Order in Council, although the words are not in terms expressed in it; and they base

that contention on the authority of *The Vesta* (1), decided by Sir Robert Phillimore in the Admiralty Court. That case was not, however, decided in respect of these very words, but on the question whether or not foreign vessels were to be considered as embraced in the terms "ships or vessels"; and the learned judge held that in the words "ships or vessels" foreign vessels ought not to be included, because they were expressly excluded by s. 59 of the statute, and the Order in Council could not be taken by simply omitting the words to have the effect sought to be given to it. It seems to me that there is a good deal to be said in favour of the view of counsel for the appellants that the ratio decidendi is analogous; but I think we are not bound to apply it here, because this is really a different case. The case before Sir Robert Phillimore was one involving much greater consequences than are likely to follow upon the decision of such a case as this. It was a question of large policy, whether foreign vessels should be embraced within the order thus extending the earlier section, which was specially limited to British vessels. It was thought that to extend the decision of the Legislature in that particular direction simply because it had used the words "ships or vessels," without confining them to British vessels, would be a large and impolitic extension, and one that ought not to be implied without more solid grounds. I do not think that the grounds which weighed with Sir Robert Phillimore apply in such a case as this. Whether that be so or not, Gorell Barnes J. has found in this case that if "constant trader" was a condition, that condition has been fulfilled, because, he says —and I agree with him—that you must not measure the question whether the vessel is a constant trader by the particular facts of one particular voyage of that vessel, but you must regard the matter from a business point of view. Take the case of a line of vessels trading constantly between London and New York. A new vessel is put on for the first time. It cannot be said that that vessel is not a constant trader simply because it has not made the voyage before. It seems to me clear, as the learned judge in the Court below

(1) 7 P. D. 240.

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has found, that you must look to what is the purpose for which this vessel was put on, and how it is going to trade. Possibly it is put on as an instrument for carrying on the same trade then being carried on by other vessels; and if you find that there is a line established trading with Antwerp, and that a particular vessel is put on and makes one voyage to and from Antwerp, it seems to me that the inference in respect to that is that it is a constant trader, and is intended to be a constant trader, within the meaning of these words.

The next point taken is whether a vessel which has gathered its cargo somewhere, say in the East, and comes with that cargo to London, and there discharges the greater part of it, and then goes on from London—taking in no cargo from London, but taking what remained of her cargo to Antwerp—whether that can be said to be a vessel trading between London and Antwerp? I think there is a good deal to be said for the contention that a vessel cannot be said to be trading when it does not take any part in—does not carry on—any trade between London and Antwerp. In this particular case the ship was taking cargo, but not cargo loaded in London for Antwerp; its object was to deliver the cargo taken on board at some remote point on the voyage. The point raised by this argument has, however, been concluded by authority, for it was decided by Lord Coleridge and A. L. Smith J.—as he then was—in *Courtney* v. *Cole*. (1) The same point was afterwards raised in another case, *The Rutland* (2), before Gorell Barnes J., and ultimately went to the House of Lords, where, on facts practically undistinguishable from those in this case, it was held that the fact that the vessel was not taking cargo out did not affect the question. The result of the two cases seems to be that when a vessel sails on a particular adventure from London or elsewhere to successive ports, she is then, within the meaning of the words, trading with such ports. The only other point is, Does the fact that the voyage to one of these ports is only, as it were, a step in a very much longer cruise make any difference? It appears to me that the authorities cover that as well as the other points, and that the only question

(1) 19 Q. B. D. 447. (2) [1897] A. C. 333.

which we have to consider is whether she was on a trading adventure to one of the ports within the exemption. It seems to me that she was, and, therefore, on all the points raised in this case the judgment of Gorell Barnes J. was right, and must be upheld.

MATHEW L.J. I am of the same opinion. The first and most important point raised by counsel for the appellants is that the exemption relied on is not in force; but that point has been settled, in a way adverse to the contention of the appellants, by the authorities which have been quoted by the Master of the Rolls.

With reference to the question of fact, it seems to me that there was abundant evidence here to justify the conclusion that this vessel was a "constant trader" within the meaning of the Act of George IV., if it were necessary that that should be determined, but I am of opinion that the addition of the word "constant" to the word "trading" is not necessary, and that trading alone is sufficient under the Order in Council to exempt the vessel from compulsory pilotage. This vessel was commencing her career, and it is said that it cannot be contended that she was "trading"; but the facts established are these: The vessel was assigned to a line of steamers, her business was to take cargoes from a home port to a Continental port, and then continue her voyage. It seems to me that you cannot insist that she must acquire the character of a constant trader by frequent voyages. It is quite enough that she was intended by her owners to continue in a certain line. That is established here, and the conclusion of the learned judge seems correct.

COZENS-HARDY L.J. I agree. The main point raised in this case, respecting the effect of the Order in Council in exempting from compulsory pilotage, was decided, not only by the Court of Queen's Bench, but by the Privy Council, in the cases referred to.

Now it may be that a decision of the Privy Council has not quite the same effect in an Admiralty appeal as a decision of the House of Lords; but the jurisdiction of the Privy Council

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in Admiralty appeals is by s. 18, sub-s. 5, of the Judicature Act, 1873, transferred to this Court of Appeal, and it seems to me that a decision of the Privy Council in Admiralty should be treated by us with at least the same amount of respect as a decision of the Exchequer Chamber would be in a Revenue appeal. Whether it is technically and absolutely binding on this Court or not, it would be wrong, after a lapse of forty years, for this Court to attempt to reverse a decision of the Privy Council on a statute of this kind.

The matter, however, does not rest there, for I can see no answer to the argument founded upon the statute of 1897. I think the declaration therein contained makes it plain that the Legislature regarded the exemptions under the statute of George IV., extended by the Order in Council, as in force at the date of the passing of that Act. The main point in the argument of counsel for the appellants seems to me, therefore, to fail.

The second point is, What is trading? That has really been decided by the House of Lords in the cases cited. The third point is whether the word "constant" ought to be imported into the Order in Council from the statute of George IV.? It does not really arise here, for I agree with what has been said by the Master of the Rolls and Mathew L.J. that, on the facts of this case, we have here what amounts to constant trading; but I entirely share the view of Gorell Barnes J. that there is no ground for importing the word "constant" into the Order in Council. That order was made in pursuance of an Act expressly authorizing the extension of the exemptions, and there is no reason for holding that it did not extend the exemptions by omitting the word "constant" found in the earlier Act.

*Appeal dismissed.*

Solicitors for appellants (defendants), the owners of the *Cayo Bonito*: *Hollams, Sons, Coward & Hawksley.*

Solicitors for respondents (plaintiffs), the owners of the *British Prince*: *Thomas Cooper & Co., for Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

T. L. M.

[IN THE CONSISTORY COURT OF CHICHESTER.]

1902
*Aug.* 6.
1903
*Jan.* 30;
*April* 17.

## DAVEY *v.* HINDE AND OTHERS.

(SECOND HEARING.)

*Ecclesiastical Law — Faculty — Interest — Parishioner of New Ecclesiastical Parish—Lord Blandford's Act* (19 & 20 *Vict. c.* 104), *s.* 15—*Right of Non-resident Ratepayer to promote Faculty Suit for Removal of Illegal Ornaments from Parish Church — Stations of the Cross—Confessional Boxes—Crucifixes—Tabernacles—Holy Water Stoups—Images of the Good Shepherd, the Virgin Mary, and the Sacred Heart and St. Joseph—Hearing of Suit after Prohibition quousque—Decree.*

The opponents in a cause of faculty instituted in the Consistory Court of Chichester for the purpose of obtaining a faculty for the removal from a parish church in the diocese of Chichester of certain ornaments and articles of church furniture objected to as illegal, after denying in their answer that the promoter was a parishioner or resident inhabitant of the parish, and submitting that he had therefore no interest cognizable by the Court, alleged therein that before any decision or final determination of the suit the Bishop of Chichester should be first consulted and his consent had, and earnestly craved his judgment in the premises, and complained and supplicated that the bishop should examine and determine the cause in his own proper person. The Chancellor of the diocese heard the cause sitting alone, the bishop not being present, and, the petitioner having objected to the bishop being consulted, determined it, delivering judgment without consulting the bishop, holding that the petitioner had a sufficient interest to promote the suit, and dealing with the merits of the case. Subsequently, a writ of prohibition having issued prohibiting the Chancellor from proceeding with the cause until he had consulted the bishop and obtained his consent to hear, decide, and determine the suit, the bishop authorized the Chancellor to hear, decide, and determine the suit. Thereupon a second hearing of the suit took place before the Chancellor; the pleadings filed and the evidence taken on the former proceedings being treated as filed and taken anew, and additional oral evidence being given both on the question of interest and on the merits; the substance of the evidence on the question of interest being that the parish church was a new parish church within a separate ecclesiastical parish formed under Lord Blandford's Act; that the petitioner at the date of his petition, and thenceforth during the proceedings in the suit, was a weekly tenant of a six-roomed house in this ecclesiastical parish, five rooms in which he underlet, keeping in his own occupation one room into which he occasionally went, but where he had never slept; that the house had been taken by him for the sole purpose of giving him a locus standi to bring the suit; and that he was entered in the rate-book of the civil

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parish out of which the ecclesiastical parish had been formed from before the commencement of the suit up to the time of the hearing, and had paid all rates due and payable by him during that period:—

*Held*, that the petitioner had a sufficient interest to entitle him to promote the suit:

*Held*, also, that a faculty must issue authorizing the promoter to remove from the parish church the following ornaments and articles of church furniture objected to as illegal:—

(1.) Fourteen Stations of the Cross hanging on the walls of the church.

(2.) Three confessional boxes.

(3.) All the crucifixes in the church with any canopy or crown over any of them.

(4.) The Tabernacle on or over the Communion Table in the chancel and the lamp burning before it; also the Tabernacle on or over the Communion Table in the side chapel used for the reservation of the Sacrament and the light burning before it.

(5.) Two movable holy water stoups.

(6.) The following images and accessories: The image of the Good Shepherd on a pedestal at the west end of the church, and the candles on each side of it and the lighted lamp in front of it. The image of the Virgin Mary on a pedestal against the chancel screen, and the candles on each side of it and the vases of flowers, and the lighted blue lamp in front of it and the curtain and canopy or crown or star over it. The images of the Sacred Heart and St. Joseph on either side of the Communion Table in the side chapel.

Legal validity given to the decision of the Chancellor of the Diocese of Chichester in *Davey* v. *Hinde*, [1901] P. 95.

IN this cause—a cause of faculty instituted on January 18, 1899, on behalf of George Davey, described in the petition in the suit as of No. 1, Lincoln Cottages, in the parish of the Church of the Annunciation, in the town of Brighton, in the diocese of Chichester, and promoted for the purpose of obtaining a faculty authorizing the removal out of the above-mentioned Church of the Annunciation of certain ornaments alleged to be illegal and enumerated in the petition in the suit—the opponents, the Rev. H. F. Hinde, the vicar, and W. H. Hammond and W. H. F. Littlechild, the churchwardens of the church and new parish of the Annunciation, Brighton, had asked in their answer in the suit that, before any decision or final determination of the cause, the Bishop of Chichester should be first consulted and his consent had, and had earnestly craved his judgment in the premises, and supplicated that he should examine and determine the cause in his own proper

person in the Court, and, on the Chancellor proceeding to hear and determine the cause sitting alone without the presence of the bishop (1), had applied for and obtained under an order of the Court of Appeal dated March 10, 1902, reversing a decision of a Divisional Court of the Queen's Bench Division (2), a writ of prohibition prohibiting Dr. Tristram, the Chancellor of the Diocese of Chichester, "from further in any wise proceeding in the said suit or on the judgment given therein" (3) until he had "consulted the said Lord Bishop of Chichester and had obtained his consent to hear, decide, and finally determine the said suit, and" George Davey from further in any wise proceeding in the suit or on the judgment obtained therein until "the said Chancellor of the Diocese of Chichester" had "obtained such consent as aforesaid, or the said bishop had determined to hear the said suit himself." (4)

On being served with this writ of prohibition Dr. Tristram communicated it to the bishop of the diocese, and having consulted him in the matter received a letter dated May 3, 1902, in which the bishop stated that Dr. Tristram having consulted him whether he intended to hear and determine himself the suit of *Davey* v. *Hinde and Others*, then pending in his Consistory Court within the archdeaconry of Lewes, or whether he would consent to Dr. Tristram hearing and determining it, he wrote upon due consideration to inform him that he consented to Dr. Tristram hearing, deciding, and duly determining the said suit. After the receipt of this letter an application for a new hearing of the suit was made to the Court by the solicitor for the petitioner, and it

(1) The proceedings are reported nomine *Davey* v. *Hinde*, [1901] P. 95.

(2) See *Davey* v. *Hinde*, [1901] P. 95, at p. 126, n. (1); *Rex* v. *Tristram*, [1901] 2 K. B. 141.

(3) See *Davey* v. *Hinde*, [1901] P. 95, at pp. 114–126.

(4) See *Rex* v. *Tristram*, [1902] 1 K. B. 816, where it was held by the Court of Appeal that a clause in the patent appointing Dr. Tristram Chancellor of the Diocese of Chichester excluding from his jurisdiction certain classes of cases, in one of which the present suit was included, unless the bishop of the diocese had after consultation consented to his grantee entertaining them, was valid, and that Dr. Tristram had had no jurisdiction to hear and determine the suit by reason of his not having consulted the bishop and obtained the consent of the bishop to the hearing, decision, and final determination of the same.

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was agreed between the solicitors for the petitioner and for the opponents that the pleadings filed and the evidence taken on the former proceedings in the suit should be treated as filed and taken for the purpose of the new hearing.

1902. May 22, 23. On these days the case was heard before the Chancellor of the Diocese of Chichester (Dr. Tristram, K.C.), sitting by the request of the Bishop of Chichester as judge in the Consistorial Court for the archdeaconry of Lewes, within the diocese of Chichester. (1)

*Dibdin, K.C.*, and *R. Dodd*, appeared for the petitioner.
*Hansell* appeared for the opponents.

Some additional evidence on the question of interest and on the merits was given orally in Court by the petitioner and one witness called on his behalf. The substance of this additional evidence, together with the result of the evidence given at the previous hearing (2), is stated in the judgment.

With the exception of an additional argument for the opponents as to the interest of the petitioner as a parishioner, if existing, for any purpose not extending so far as to entitle him to object to ornaments placed in a church the services in which he never attended, the arguments on both sides on the question of interest were the same in substance as those set out in the report of the previous hearing. (3)

[The following additional authorities were referred to: *Stephenson* v. *Langston* (4); *Reg.* v. *Harding* (5); Alcuin Club Tracts, No. 1; The Ornaments of the Rubric, 1897, p. 47 (J. T. M. Micklethwaite); Parliamentary Return as to Con-

(1) The Court sat in the Church of St. Michael, Lewes, the ancient place of judicature of the Court.

(2) The notes of evidence taken by Dr. Tristram at the previous hearing were, by consent of counsel, admitted to prove the evidence of the witnesses examined before him at that hearing. A memorial in support of the petition signed by over 300 persons, parishioners of the parish of the Annunciation, Brighton, was admitted by the Court as evidence de bene esse: see *Davey* v. *Hinde*, [1901] P. 95, at p. 100, n. (1).

(3) See *Davey* v. *Hinde*, [1901] P. 95, at pp. 100, 104.

(4) (1804) 1 Cons. 379.

(5) (1889) 6 Times L. R. 53.

fessional Boxes, 1899; *Jones* v. *Gough* (1); *Cronshaw* v. *The Wigan Burial Board.* (2)]

*Cur. adv. vult.*

1902. Aug. 6. DR. TRISTRAM. In this case Mr. George Davey filed a petition in this Court in January, 1899, in which he is described as of No. 1, Lincoln Cottages, in the parish of the Church of the Annunciation, in the town of Brighton, and is therein alleged to be a parishioner and ratepayer of the said parish. The petition was filed for the purpose of obtaining a faculty authorizing the removal out of the said church of certain ornaments alleged to be illegal and which were enumerated in the petition. (3) Upon the petition having been filed, a citation issued from the Court citing the parishioners and inhabitants of the parish before the bishop's commissary or his surrogate, or other competent judge in this behalf, on a day named, and to shew cause why a monition should not be issued or a faculty granted as prayed.

The vicar and churchwardens of the parish of the Church of the Annunciation appeared to the citation, and filed an answer, and alleged that the petitioner was not a parishioner or resident inhabitant of the new parish of the Annunciation, Brighton, and had therefore no interest cognizable by the Court on the subject-matter of this petition. They also alleged that none of the articles or things mentioned in the petition were or are in themselves illegal, and that before any decision or final determination of the cause aforesaid the Lord Bishop of Chichester should be first consulted and his consent had, and they earnestly craved his judgment, and humbly complained and supplicated that the said Lord Bishop should examine and determine the said cause in his own proper person, and they lastly submitted that the faculty should be refused. To this the petitioner replied that he was a parishioner and ratepayer of the new parish of the Annunciation, Brighton, in respect of No. 1, Lincoln Cottages, in the said parish, and denied all the allegations contained in

(1) (1865) 3 Moo. P. C. C. (N.S.) 1.

(2) (1873) L. R. 8 Q. B. 217.

(3) See *Davey* v. *Hinde*, [1901] P. 95, at p. 97, where the material contents of the petition are set out.

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paragraphs 2, 3, and 4 of the respondents' answer, and submitted that the consent of the Lord Bishop of Chichester was not necessary to the hearing and determination of the cause, and supplicated that the cause might be examined and determined before the official principal of the Court. Both the solicitors, on April 28, 1899, signed a declaration that they gave in no further pleadings, and thereupon the cause was assigned for hearing and the examination of witnesses. Subsequently an application was made to me on behalf of the petitioner and respondents to fix a date for the hearing of the cause. I named a day; but as it was inconvenient to Mr. Jelf, K.C., who was the leading counsel for the respondents, I ultimately fixed the hearing of the case to take place before me at Lewes in the Christmas vacation on January 4, 1900, for the convenience of counsel on both sides. The case was heard on January 4, 5, and 6, and neither before nor during the hearing was any suggestion or application made to me by Mr. Jelf that it was the wish of the respondents that the case should be heard before the bishop, and I assumed that by the reservation in my patent of appointment as Chancellor it was intended that the Chancellor was to hear the cause, but not to give judgment in it without consulting the bishop and obtaining his consent. There were four witnesses examined on the part of the petitioner, and one on the part of the respondents, and the questions raised by counsel during their arguments related (1.) to the status of the petitioner, whether he had shewn that he had sufficient interest to obtain the removal of the ornaments he complained of in a civil suit; and (2.) if he had, whether he was entitled to an order for their removal from the church on the ground that they were illegal ornaments; but Mr. Jelf towards the close of his case submitted to the Court that as the patent under which the Chancellor of the Diocese of Chichester sits requires that in case either party to a suit earnestly craves the bishop's judgment, the bishop should be consulted and approve of any judgment the Court might come to in order to give the decision validity, he urged me on behalf of his clients not to give judgment in the case without first consulting the bishop on

my proposed decision, and obtaining his Lordship's consent to it. My answer to this part of his application in my judgment was that, as the petitioner in his reply objected to the bishop being consulted by me as to his decision, the question thus raised between the parties was in effect whether the reservation in the patent in favour of a reference to the bishop on this point was valid at common law and related to my jurisdiction, and was therefore one for the determination of the King's Bench Division of the High Court of Justice, and not for me sitting as a judge of an Ecclesiastical Court to determine.

At the conclusion of the arguments of counsel, it was arranged with the concurrence of counsel on both sides that I should inspect the church and the ornaments therein, and after having done so should deliver my judgment on the question of the petitioner's interest; and if I found for his interest and no appeal was prosecuted against my decision on that issue, that I should then give my decision on the legality of the ornaments objected to. I visited the church, and on February 1, 1900, I delivered judgment in favour of the petitioner's interest. (1) There was an appeal against my decision on the question of interest, which, being subsequently abandoned, I delivered judgment on August 21, 1900, as to the legality of the ornaments, and decided against their retention in the church as being unlawful ornaments; but the respondents being represented by their solicitor and not by counsel, I decreed a faculty for the removal of the ornaments pro formâ only, directing that it should not be issued before the middle of the November following, in order to give the counsel for the respondents time to consider whether they would take further proceedings in the matter. Before I had made or completed a final order in the matter, the respondents moved, by counsel other than those who had represented them in this Court, before a Divisional Court of the King's Bench Division of the High Court of Justice for a prohibition against my further proceeding in the matter, on the ground that under my letters patent, the respondents having in their answer asked that the bishop should hear and determine the case, I ought never even to have heard it without

(1) See *Davey* v. *Hinde*, [1901] P. 95, at pp. 106–114.

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consulting his Lordship and obtaining his consent to my hearing it. Darling and Channell JJ. held in the Divisional Court that the question raised related to procedure and not to jurisdiction, and was a matter of appeal, and refused the rule for a prohibition. (1) From this decision the respondents appealed to the Court of Appeal, where it was held that this question was one of jurisdiction and not of procedure, and therefore matter for a prohibition, the Court holding that according to their construction of the clause in the letters patent upon a party asking the bishop to hear the cause it was contemplated that the Chancellor of the diocese should consult the bishop therein, and that the bishop should either elect to hear and determine the case himself or request the Chancellor to hear and determine it, and making an order for the issue of a prohibition to this effect. (2) Upon the prohibition issued in pursuance of this order being served to me, I communicated it to the bishop, and, having consulted him in the matter, his Lordship after consideration requested me to hear and determine the case.

By the consent of both parties the pleadings filed and evidence taken in the former proceedings are to be treated as filed and taken in the present proceedings.

The case was heard in this Court on the 22nd and 23rd of May, 1902, when I read the bishop's letter requesting me to hear and determine the case and ordered it to be filed in Court; and thereupon Mr. Hansell, who appeared for the respondents, said that after very careful consideration of the case it had been determined that he should argue before me only the question of the sufficiency of the petitioner's interest to maintain this suit. He added: "I do not propose to discuss before you again the legality or illegality of the ornaments in the church. If you are against me on the question of the petitioner's status, I shall leave what took place on the former occasion in your hands; though not in any way assenting or consenting to any decision you may come to on that part of the case, I am quite willing that the evidence given before the

(1) See *Rex* v. *Tristram*, [1901] 2 K. B. 141.

(2) See *Rex* v. *Tristram*, [1902] 1 K. B. 816.

Court at the former hearing should be taken as given in this case." Mr. Dibdin, K.C., who appeared for the petitioner, then said: "We both consent that the note of evidence taken by you at the former hearing shall be taken as evidence and read, and treated as if it had been taken at the present hearing, provided that either side is at liberty to adduce further evidence." Mr. Hansell agreed to the above statement of Mr. Dibdin, and also stated that Mr. Henry Hammond and Mr. Littlechild were still churchwardens of the Church of the Annunciation, Brighton. Mr. Dibdin then read the evidence given at the former hearing of this case in January, 1900, by the following witnesses, taken from my notes—namely, Arthur Smidt, George Davey, Edwin Bennett Vizer, Richard Augustus Cripps, and William Henry Hammond, one of the respondents—and afterwards examined Mr. Hamblin and the petitioner.

It is settled law that the promoter of a civil suit in the Ecclesiastical Courts must, if called upon by the opposite party, satisfy the Court that he has a personal interest, or the possibility of a personal interest, in the subject-matter of the suit, and that unless he so satisfy the Court his suit is dismissed.

The leading case on this point is *Fagg* v. *Lee*. (1) The circumstances leading up to it were as follows: [DR. TRISTRAM then read and adopted as a portion of his judgment the previous judgment delivered by him on February 1, 1900, in the case of *Davey* v. *Hinde* (2) on the question of the petitioner's interest from the words "The archbishops and bishops" (3) down to the words "Judicial Committee" (4), and proceeded:—]

On the question of interest the petitioner's evidence was as follows: His brother was owner of No. 1, Lincoln Cottages, in this parish. He became his weekly tenant of it on September 26, 1898, at 10*s*. per week. He paid the first week's rent on October 3, 1898. He put in evidence his rent-book, with

(1) (1873) L. R. 4 A. & E. 135; (1874) L. R. 6 P. C. 38.
(2) [1901] P. 95, at pp. 108–112.
(3) [1901] P. 95, at p. 108.
(4) [1901] P. 95, at p. 109.

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the weekly rents receipted by his brother from that date up to the present time. He procured his entry on the rate-book on September 29, 1898. There were six rooms in the house, five of which he had let for 6*s.* per week. He kept one large room on the ground floor in his own occupation. He had put some furniture in it, but never slept in it, and only went into it occasionally. He stated on cross-examination that he had taken the house for the sole purpose of giving him a locus standi to bring this suit, and that he was in partnership with his brother as a builder, and that they were joint owners of many small houses in the parish.

The rate collector for the parish of Brighton produced his rate-book, by which it appeared that the rateable value of the house was 15*l.* 3*s.*, that the petitioner's name was on the rate-book as occupier of the house, and that he had paid the rates due from September 28, 1898, up to April, 1900.

This evidence on the head of interest was supplemented at the hearing of the present case by that of Mr. Hamblin, a rate collector for part of the parish of Brighton, by which it appeared by rate-books produced that the rate-book from March 25 to September 29, 1901, contains the following entry in respect of No. 1, Lincoln Cottages: "Occupier, George Davey. Owner, William Davey, in substitution for Davey Brothers. Description of property, House. Gross estimated rental, 19*l.* Rateable value, 15*l.* 10*s.* Previous rate paid in the time limited for payment." That there was the same entry in the rate-books for the six months from September 29, 1901, to March, 1902, and that the rate for the six months during that period had been paid. The witness further stated on cross-examination that he had all the rate-books in Court from September, 1898, up to the present time; that he had examined them all, and that George Davey was entered as occupier of No. 1, Lincoln Cottages during the whole of that time. The objections to the petitioner's interest at the previous and the present hearing were that—[DR. TRISTRAM stated the objections in question in the terms in which he had stated the first and second objections of Mr. Jelf in the above-mentioned judgment delivered on February 1, 1900, in *Davey* v.

*Hinde* (1), and after dealing with those objections by adopting and reading as his judgment with respect to them the remaining portion of that judgment down to the words "Baggallay J. concurred" (2), continued:—] Mr. Hansell in his argument urged further that from the nature of the petitioner's occupancy he was to all intents a stranger to the parish, and that in respect of his occupation he had suffered no injury or pecuniary loss, as in the case of *Etherington* v. *Wilson* (3), referred to in the judgment I have read, or in being prevented from attending the services as a parishioner, as he objected to the nature of the services, and resided with his family in a parish where the services were conducted in a manner which accorded with his religious views, and were attended by him. On the assumption that the ornaments objected to were not unlawful ornaments, this objection to his interfering with their retention in the church would be entitled to the consideration of the Court in the exercise of its discretion. But should they be held to be illegal, I consider that as a ratepayer he is entitled to take measures to secure their removal from the church.

The Court is therefore of opinion that the objections cannot be sustained, and that the petitioner has established a sufficient interest to entitle him to proceed with the suit on the charges alleged in the petition.

I will now proceed to consider the questions raised in this case on the merits. The object of the suit is to obtain an order for a monition or faculty to issue to the churchwardens of this parish, or for a faculty to issue to the petitioner or to such other person or persons as the Court may elect, to remove the following ornaments or articles of furniture from the Church of the Annunciation, Brighton, on the ground that they are ornaments or articles of furniture that by ecclesiastical law cannot lawfully be introduced into or retained in a church —namely, (1.) the Stations of the Cross; (2.) an image of the Good Shepherd, with candles on each side and a lighted lamp in front of it; (3.) an image of the Virgin Mary with candles on each side of it, vases of flowers, and a lighted blue

(1) [1901] P. 95, at pp. 110–114. (2) [1901] P. 95, at p. 114.
(3) (1875) 1 Ch. D. 160.

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light before it, and a curtain with a canopy or crown or star over it; (4.) two holy water stoups, for which since the previous hearing two movable vases of china or earthenware have been substituted, with holy water in them; (5.) three confessional boxes; (6.) several crucifixes in different parts of the church; (7.) on the Communion Table in the side chapel a Tabernacle, with a light burning before it; (8.) over this Tabernacle a crucifix with a crown over it; (9.) two images on either side of the same Communion Table, one representing the Sacred Heart and the other St. Joseph; (10.) another Tabernacle on the Communion Table in the chancel. The petition concludes with a prayer for a monition to issue to the churchwardens of the church requiring them to remove the above ornaments or articles of furniture from the church, or to grant a faculty to the petitioner or some other person to effect their removal. [DR. TRISTRAM then read and adopted as his judgment on the merits of the case the judgment delivered by him on August 21, 1900, in *Davey* v. *Hinde* (1), commencing from the words on p. 114, "The Church of the Annunciation was erected," down to the words on p. 118, "on four different days," being that portion of that judgment which dealt generally with the ornaments objected to as illegal, and the particular evidence given at the previous hearing of that suit as to the Stations of the Cross, and continued:—]

At the second hearing of the case Mr. Davey supplemented his previous evidence as follows: "I was at the Annunciation Church last Sunday at the 11 A.M. service. I examined the furniture and ornaments I objected to to ascertain whether they were the same as they were at the time of the previous trial. They appeared to be exactly the same. I noticed the image of the Virgin Mary. There were three candles burning before the image, and also the lamp with a white light, which is always burning before the image of the Virgin. There was also a quantity of white flowers on a pedestal upon which she was standing and round the front. I could see the general appearance of the church. I saw the image of the Good Shepherd. There were two candles, one on either side of

(1) [1901] P. 95.

the image, alight. I remained to the end of the service—it was a High Mass. They censed the altar; the clergy and the choir and then towards the congregation. I stayed the whole of the service. I was present at the consecration of the elements. There were no communicants except the officiating clergy. Portable lights were used during the service. Immediately before the Communion Service began lights were carried in the procession of the clergy and choir right round the church. They were not used at the reading of the Gospel. The Gospel was read inside the communion rails, on the left side facing the chancel. There were two lighted candles carried before the Gospel was read from the right-hand side of the chancel across to the left. When they crossed to the left they were out of sight where I was standing while the Gospel was being read. There was afterwards immediately before the consecration a procession from the vestry into the chancel consisting of the censer and four choir boys each carrying a tall lighted candle. They stood in the front of the Holy Table while the bell rung, and during the act of the consecration a gong was struck. Immediately afterwards the church bell was tolled. I could not see any one receiving the Holy Communion. After the consecration the procession returned with four lighted candles. There was no pause to enable persons to communicate. I heard the sermon. Mr. Hinde was the preacher; he wore a red chasuble. Before the sermon he said, 'Of your charity pray for the souls of those who have fallen in South Africa in the past week or have died there from sickness, and of the several parishioners' (naming those who have died), 'and for the repose of the soul of Father Dolling.' He also gave notice that the Holy Sacrifice would be offered every day during the Whitsuntide week, and in announcing the times he said, 'The Mass will be said every day'; and on one day he announced a choral Mass." The *Church of the Annunciation Parish Magazine* of May, 1902, and a paper of the services at this church for Passion week, Holy week, Good Friday, and Easter Day, 1902, were put in evidence, marked Nos. 3, 4, and 5. From the above evidence it is patent that the purpose for which the Stations of the Cross are in this church is to enable

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a service to be celebrated there which is prescribed by and in use in the Church of Rome, but which is in contravention of the doctrines and practice of the Church of England. It is, therefore, imperative on the Court, following the decision of the Arches Court and of the Judicial Committee of the Privy Council in the *Ridsdale Case* (1), to make an order for their removal.

The next question for the consideration of the Court relates to three confessional boxes which were in the church at the time of its consecration.

[DR. TRISTRAM then read and adopted as his judgment in the present case the portion of the judgment delivered by him on August 21, 1900, with reference to the three confessional boxes in the church in the case of *Hinde* v. *Davey* (2), and continued:—] It is my duty to order the three confessional boxes to be removed from the church in accordance with the judgment of Archbishop Sumner, on the ground that they are not articles of church furniture requisite for or conducive to conformity with the doctrine or practice of the Church of England in relation to the reception of confession.

The next question for my consideration relates to two movable china or earthenware vessels, which have been substituted since my previous judgment for two water stoups which had been introduced into the church during the two previous years for holding holy water, and which, according to Mr. Hammond's evidence, were used by one in ten of the congregation in entering and going out of the church in the same manner as is usual in Roman Catholic churches. An order will be made for the removal of these movable china or earthenware vessels as illegal ornaments in a church.

As to the crucifixes, on inspecting the church subsequently to the second hearing of the case, I observed that four had been placed there, one on a box in the centre of the chancel reredos, another on the wall above and immediately behind the pulpit, another on the north wall of the church, and a fourth on the reredos in the side chapel. The figure of Our Saviour on the

(1) (1876) 1 P. D. 316; (1877) 2 P. D. 276.
(2) [1901] P. 95, at pp. 118–20.

cross, as forming the central figure of the historical representation of the momentous scene of Our Lord's Ascension, was held by the Judicial Committee of Her Majesty's Privy Council in the *Exeter Reredos Case* (1) to be a lawful church decoration.

There are two questions that arise on this branch of the case —first, whether these isolated crucifixes are in law architectural decorations or church ornaments: if they are in law architectural decorations they might remain; but in law and fact they cannot be held in the opinion of the Court to be architectural decorations. In the Anglo-Canon law prior to the Reformation they were described as and held to be church ornaments. Thus Archbishop Winchelsea by one of his constitutions obliged parishioners to find at their own charge divers ornaments for their parish church, and amongst those are images of Christ Crucified: see 1 Phillimore's Ecclesiastical Law, p. 730; Lindwood's Provincale, pp. 252–253. The crucifix is, therefore, a church ornament, and, if it is a church ornament, the second question is whether it is a lawful church ornament.

[DR. TRISTRAM proceeded to state that the question whether a crucifix was or was not a lawful church ornament came under the decision of Dr. Lushington in the cases of *Westerton* v. *Liddell* (2) and of *Beal* v. *Liddell* (3), and on appeal in the same cases to the Court of Arches and the Judicial Committee of the Privy Council (4), and that it would appear to have been severally accepted in these decisions as admitted law that a crucifix was not a lawful church ornament, and to read and adopt as the judgment of the Court in the present case and as applicable to the whole of the crucifixes objected to, the judgment delivered by him as Chancellor of the Diocese of London in the case of *Kensit* v. *Rector of St. Ethelburga, Bishopsgate Within* (5), so far as it related to the cases of *Westerton* v. *Liddell* (2), *Beal* v. *Liddell* (3), *Martin* v. *Mackonochie* (6), and *Phillpotts* v. *Boyd* (7), and to the use of crosses and crucifixes in churches, commencing from the words "The question

(1) *Phillpotts* v. *Boyd*, (1875) L. R. 6 P. C. 435, at p. 466.
(2) (1857) Moore's Special Reports.
(3) (1857) Moore's Special Reports.
(4) (1857) Moore's Special Reports.
(5) [1900] P. 80, at pp. 94–100.
(6) (1868) L. R. 2 P. C. 365.
(7) L. R. 6 P. C. 435.

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however whether a crucifix was or was not a lawful church ornament" (1) to the words "keeping it in force up to the present day" (2), concluding the portion of his judgment with reference to the question of the crucifixes objected to as follows :—] The finding of the Court on the question of crucifixes is, first, that they are in ecclesiastical law ornaments and not architectural decorations, and not being in use in the Church in the second year of Edward VI. as church ornaments, their introduction into a parish church is prohibited by the Ornaments Rubric. Secondly, that if they are deemed to be architectural ornaments, whether carved in wood, stone, or other material, having regard to the fact that all crucifixes were by statutory injunctions and proclamations issued at the time of the Reformation, and by 3 & 4 Edw. 6, c. 10, ordered to be removed from all churches as being tainted with superstition, and as they are still liable to be used for superstitious purposes, it is not competent to an Ecclesiastical Court to grant a faculty for the introduction into or retention in a church of an isolated crucifix as an architectural decoration. The order of the Court will be that the crucifixes be removed from the church.

The next question relates to the Tabernacle, said to be for the reception of the Reserved Sacrament on the Holy Table in the chancel, before which there is a light kept continually burning—and another Tabernacle on the Holy Table in the side chapel, before which also a light is always kept burning, and which, according to the evidence, is continually used for the reservation of the Sacrament. There will be an order for the removal of both of these Tabernacles.

The other ornaments complained of are an image of the Good Shepherd, placed on a pedestal at the west end of the south aisle of the church, with candles on each side of it, and a lighted lamp in front of it. An image of the Virgin Mary placed upon a pedestal standing against the screen separating the chancel from the nave, with candles on each side of it, vases of flowers and a lighted blue lamp before it and a curtain with a canopy, crown, and star over it. Images on either side of the Holy

(1) [1900] P. 80, at p. 94. (2) [1900] P. 80, at p. 100.

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Table in the side chapel representing the Sacred Heart and St. Joseph. An order will be made for the removal of all these images and the two holy water stoups, as having been introduced into the church without a faculty, and as inappropriate ornaments for an English church, and in particular seeing that there were lights burning before the images, as liable to give offence to the members of the Protestant Church of England.

The Court condemns the respondents in the petitioner's costs of the second hearing of this case. The faculty will issue authorizing the churchwardens to remove the above ornaments from the church within one month from the date of the issue of the faculty, and in the event of their not having removed them by the expiration of that time will give power to the petitioner to remove them. The faculty will not issue until the middle of November next.

On August 7, 1902, a formal decree or order was made by the Court in conformity with the above judgment whereby the Court "pronounced, decreed, and declared that the petitioner had sufficient interest to entitle him by law to proceed in the said suit, and that the petitioner had sufficiently proved the contents of his petition, and ordered (inter alia) W. H. Hammond and W. H. F. Littlechild, churchwardens of the said parish of the Annunciation, Brighton, and respondents in the said suit, to remove from the said church the several ornaments and articles of church furniture," for the removal of which it was stated in the above judgment that an order would issue.

1903. Jan. 30. An order was made in the suit that in the event of the respondents failing to remove the ornaments and articles of church furniture ordered to be removed by the order of the Court of August 7, 1902, within one calendar month of the order then made on the churchwardens of the Church of the Annunciation, respondents in the suit, or their solicitors, a faculty authorizing the petitioner George Davey to remove the aforesaid ornaments and articles of church furniture do issue to the petitioner.

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This order was duly served on the solicitors to the opponents, but was not obeyed, and on April 17, 1903, a faculty in the name of the Bishop of Chichester issued to the petitioner ratifying and confirming all and whatsoever the Chancellor of the diocese had done and decreed in the premises, and giving and granting the faculty or licence of the bishop to the petitioner to authorize or empower him to remove from the Church of the Annunciation, Brighton, aforesaid, the several ornaments and articles of church furniture set out in the above-mentioned order of August 7, 1902, but subject to the following proviso contained in the faculty: "Provided always that the said ornaments and articles of church furniture be carefully deposited by or under the direction of the petitioner at No. 1, Lincoln Cottages, situate within the parish aforesaid, and that written notice specifying the place where the said ornaments or articles of church furniture have been deposited as aforesaid shall be forthwith served upon the respondents or their solicitors, with an intimation that they will be delivered over to the churchwardens on their applying to the petitioner for them. And from and after the service of such notice the aforesaid ornaments and articles of church furniture so deposited as aforesaid shall be deemed to belong to and be the property of the respondents, who shall thenceforth be responsible for the same, and liable for the payment of the rent, costs, and expenses thereafter to be incurred in respect of the warehousing thereof."

Solicitor for petitioner: *Grantham R. Dodd.*
Solicitors for opponents: *Brooks, Jenkins & Co.*

C. F. J.

## WILSON *v.* BASSIL.

1903
*July* 29, 30.

*Probate—Practice—Will—Undue Influence and Fraud unsuccessfully pleaded —Costs out of the Estate.*

Where the facts surrounding the making of a will bring the case within the principles laid down in *Brown* v. *Fisher*, (1890) 63 L. T. 465, *Fulton* v. *Andrew*, (1875) L. R. 7 H. L. 448, and *Tyrrell* v. *Painton*, [1894] P. 151, and impose upon the party propounding the will, not merely the onus of proving due execution and testamentary capacity, but the additional burden of removing the suspicion attaching to the making of the will, a person opposing it is primâ facie justified in pleading undue influence and fraud, and, though unsuccessful, ought not to be condemned in costs unless the circumstances of the case be such as to render it unreasonable for him to raise such issues.

Where a defendant put forward those pleas and failed, the Court, following the case of *Orton* v. *Smith*, (1873) L. R. 3 P. & M. 23, ordered that the costs of the defendant, as between party and party, be allowed out of the estate, after the plaintiff, who succeeded in discharging the additional onus of proof cast upon her in the case, should have first taken her costs, as between solicitor and client, out of the estate.

PROBATE SUIT.

The testatrix, Eliza Sarah Bird, deceased, died at Windsor on April 2, 1902, aged eighty-two.

The plaintiff, Frances Mary Wilson, a niece of the testatrix, claimed revocation of the probate, dated June 22, 1902, of a will made by the testatrix on December 2, 1892, and the plaintiff propounded a later will, dated May 28, 1900.

The defendant, John Bird Bassil, a nephew of the testatrix, pleaded that the later will was not duly executed; that the deceased was not of sound mind, memory, and understanding; that the execution of that will was obtained by the undue influence of the plaintiff, the substance of the case under this plea being that the plaintiff and her mother urged the testatrix to make a will in favour of the plaintiff, and that the plaintiff threatened to send the testatrix to the workhouse. The defendant also pleaded that the execution of the said later will was obtained by the fraud of the plaintiff, such fraud, "so far as is within the defendant's present knowledge," being that the plaintiff and her husband represented to the testatrix

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that she (the testatrix) possessed no property to leave, and that the defendant was a bankrupt and could not assist the testatrix.

At the hearing it was shewn that the will of May 28, 1900, was made under the following circumstances. In March, 1899, the testatrix went to reside with the plaintiff, and paid 12*s.* a week for her board. On April 2, 1899, the testatrix had an apoplectic seizure, which paralyzed her right side. In May, 1900, the plaintiff's husband called on a Mr. Wright and asked him to go and take instructions for a will. Mr. Wright accordingly called and saw the testatrix, and took her instructions for a new will, revoking all former wills and leaving everything to the plaintiff, who was present during the interview. Mr. Wright, not being a solicitor, advised the testatrix to send for a solicitor, and the plaintiff went to see one, and asked him to prepare a will on the instructions given to Mr. Wright. This was done, and the solicitor attended upon the testatrix on May 28, 1900, taking with him a fair-copy will. He had never seen her before, but he and her doctor gave evidence to the effect that she knew perfectly well what she was doing. At the time the will was read over to her she said she had quite decided to leave everything to her dear niece, who had so kindly nursed her through her illness. A clergyman and other witnesses who saw the testatrix about the same time all said that she was perfectly rational. The will was given to the plaintiff after it had been duly executed and attested.

On behalf of the defendant it was shewn that the testatrix, by her will of December 2, 1892, as well as by a still earlier will made in 1882, had left all her property, consisting of a few small cottages in Eton, to the defendant, his two sisters, and a nephew, James Marriott, the plaintiff not being mentioned in either of those wills. It was further proved that the last will was not mentioned, either by the testatrix or by the plaintiff, even to the plaintiff's sister, who went to the house every day and managed the property of the testatrix, nor did the defendant, who called every week, hear anything of it. Moreover, the testatrix, between May 28, 1900, and the date

of her death, several times stated to the defendant, to his sister, and to James Marriott, that they would have all she had to leave.

On the day of the funeral the defendant announced that he would proceed to prove the will of 1892 unless there were a later will. The plaintiff did not, even then, mention the will of 1900, nor did she in fact put forward the same until after the defendant had proved the will of 1892.

WALTON J. The facts bring this case within the rule laid in *Brown* v. *Fisher* (1) and *Fulton* v. *Andrew*. (2) A burden was cast upon the plaintiff, not merely to prove the due execution of the will of May 28, 1900, and the testamentary capacity of the testatrix on that day, but to remove the suspicion attaching to that will. On the evidence of the witnesses called on behalf of the plaintiff I have come to the conclusion that she has discharged that additional burden of proof which rested upon her, and I therefore pronounce for the last will and revoke the probate of the will of 1892. On the question of costs I will hear counsel further.

*W. O. Willis*, for the plaintiff. The practice which has prevailed for some years past should not be departed from. Where undue influence and fraud are unsuccessfully pleaded, costs nowadays follow the event. [He cited *Groffman* v. *Groffman*. (3)]

*Slade Butler*, for the defendant. That practice ought not to apply to cases where an additional burden of proof is cast upon a party propounding a will, in which he or she is solely or largely benefited, to prove the "righteousness of the transaction," or, in other words, to remove the suspicion attaching to the document: *Fulton* v. *Andrew* (4), per Lord Hatherley; *Tyrrell* v. *Painton* (5), per Davey L.J. In former years no such hard and fast rule of practice as that which is now said to prevail applied, and, in *Orton* v. *Smith* (6), where undue influence and fraud involving a charge of forgery were

(1) 63 L. T. 465.
(2) L. R. 7 H. L. 448.
(3) *The Times*, Oct. 28, 1891.
(4) L. R. 7 H. L. 448, at p. 472.
(5) [1894] P. 151, at p. 160.
(6) L. R. 3 P. & M. 23.

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unsuccessfully pleaded, the Court allowed the costs of the party who so pleaded out of the estate.

WALTON J. The present case being within *Brown* v. *Fisher* (1) and *Fulton* v. *Andrew* (2), there was a presumption against the will of May, 1900, which presumption the person propounding the will was bound to rebut, as Lord Hatherley said in *Fulton* v. *Andrew* (3), "by shewing the righteousness of the transaction." The defendant was, at all events primâ facie, entitled to presume what the law presumes, and to call upon the plaintiff to prove not merely the valid execution of the will, but also that it was not obtained by fraud or undue influence, and that it does really express the true will of the deceased. The defendant did this by pleading undue influence and fraud. There may be cases which fall within the rule laid down in *Brown* v. *Fisher* (1), and in which, nevertheless, the circumstances may be such as make it unreasonable for the person disputing the will to plead undue influence and fraud, but there is nothing in the circumstances of the present case which made it unreasonable for the defendant by his pleading to raise those issues. I think that the circumstances of the case and the conduct of the plaintiff reasonably excited suspicion and justified those pleas.

The fact that the plaintiff has now, by the evidence adduced on her behalf, succeeded in discharging the additional burden of proof does not affect the right which the defendant had to call upon her to do it. I shall follow the case of *Orton* v. *Smith* (4), and, in doing so, I do not think that I am departing from the established practice. The order I make is that the plaintiff's costs, as between solicitor and client, be taken by her out of the estate, and, subject thereto, that the costs of the defendant as between party and party be paid out of the estate.

Solicitors for plaintiff: *Welman & Sons, for Last & Goodford, Windsor.*

Solicitor for defendant: *R. L. Butler.*

(1) 63 L. T. 465.
(2) L. R. 7 H. L. 448.
(3) L. R. 7 H. L. 448, at p. 472.
(4) L. R. 3 P. & M. 23.

H. D. G.

## In the Goods of AUGUSTUS STANLEY SCOTT.

1903
*Aug.* 3.

*Probate—Soldier's Will—"Effects" to be "credited"—Wills Act* (1 *Vict.* *c.* 26), *s.* 11.

A declaration, made by a soldier on active service at the instance of the military authorities, who made a note of it at the time, to the effect that in the event of his death he desired his "effects" to be "credited" to one of his sisters (named):—

*Held*, to be a valid testamentary document.

This was a motion on behalf of Helena Louisa Scott, a sister and one of the next of kin of Augustus Stanley Scott, deceased, for "a grant of administration to the personal estate and effects of the said deceased with the contents of a nuncupative will of the 12th day of May, 1901, annexed, such contents being contained in a testamentary document written on the 12th day of May, 1901."

The application was opposed by Amy Ethel Robinson, a married sister of the deceased.

The only other next of kin was a brother of unsound mind.

It appeared that, in addition to a sum of 29*l.* 10*s.* 9*d.* deferred pay and the medals and personal effects of the deceased, he was entitled to a sum of about 866*l.* 1*s.* 11*d.* in the hands of trustees, and to other sums in their hands in respect of accumulated income on the said sum, due to him under the estate of his late mother.

It further appeared that although the declaration now set up as a will was made in May, 1901, the deceased in corresponding with his relatives never mentioned it. He died of wounds in South Africa on March 3, 1902.

The deceased was formerly a clerk in the tea trade, employed in London, and he volunteered for service in the South African War. In the soldier's "small book," which was among his equipment, the usual concise instructions and simple forms of will were found, but the forms of will were not filled up.

The affidavit of Edward Massey Ketley, squadron sergeant-

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major in H.M. 9th Lancers, declared at Rawal Pindi, Punjaub, India, on April 14, 1903, was as follows:—

"In the early part of the year 1901 the attention of the officers commanding the various regiments then located in South Africa was called by the War Office to the fact of so many cases of men having been killed or dying without leaving any trace of their next of kin or any statement as to how they desired their effects disposed of, and directions were given or steps taken to prevent, if possible, such cases occurring in future.

"The commanding officer therefore directed squadron officers to submit rolls to orderly room shewing the next of kin of all men under their command, or the person to whom they desired their effects should go in the event of death.

"In compliance with this order the deceased, Private Augustus Stanley Scott, on the 12th day of May, 1901, gave in the name of his sister and the address shewn in the following declaration as the person to whom he wished his effects to go.

"The declaration made by the deceased, Private Augustus Stanley Scott, in my presence, was in the words and figures following:—

"No. 4059, Private A. S. Scott, made a statement to me at Rouxville, O. R. Colony, on the 12th May 1901, to the following effect:—

"'In the event of my death in South Africa, I desire all my effects to be credited to my sister, Miss N. Scott, 39, Hanley Road, London, N.'"

The affidavit of William Augustus Letts, squadron quartermaster sergeant, 9th Lancers, was in practically identical terms.

*Barnard*, in support of the motion, referred to *Morrell* v. *Morrell*. (1)

*Durley Grazebrook*, in opposition. This case goes further than any other. The main point is the question of intention. The language of the declaration clearly shews that the deceased had no thought of passing the whole of his property, but was

(1) (1827) 1 Hagg. Eccl. 51.

merely obeying the military instructions of his superior officers in making the declaration, to enable them to forward his personal "effects" to the applicant in case he should die on active service. [He referred to the King's Regulations, ss. 692 to 695, and to the Regulation of the Forces Act, 1881 (44 & 45 Vict. c. 57), s. 51, and the Regimental Debts Act, 1863 (26 & 27 Vict. c. 57), s. 7.]

*Barnard*, in reply.

JEUNE P. The affidavits prove the making of the declaration by the deceased while on active service, and the document embodying the declaration I hold to be testamentary. I am unable to give any other meaning to it, and I pronounce in favour of the document as his will. I agree that the language employed is peculiar. Whether, in military language, "effects" includes all the property of the deceased, and whether the words "I desire all my effects to be credited" will, in law, operate to pass all his property to the applicant beneficially, are matters of construction with which I am not now concerned and which I do not consider myself called upon to decide. If the result should be that all the property passes, the costs of both parties may be paid out of the estate; but if, on the other hand, the will only operates in the limited way suggested, there will be no order as to costs here.

Solicitors: *A. J. Ford; Daniel Stock.*

H. D. G.

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*July* 29, 30;
*Aug.* 10.

## CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE.

*Divorce—Husband's Suit—Adultery of Petitioner—Discretional Bar—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Decree.*

In a husband's suit for dissolution of marriage, upon findings of fact that the petitioner and respondent had both committed adultery, the Court, finding as a further fact that the adultery of the petitioner had not conduced to the adultery of the respondent, exercised in favour of the petitioner the discretion conferred by the Matrimonial Causes Act, 1857, s. 31, and pronounced a decree nisi, dissolving the marriage.

Although the discretion conferred by s. 31 is a judicial and not an arbitrary discretion, the causes for, and the circumstances under, which the Court may exercise its discretion in favour of a guilty petitioner are to be taken in combination and according to their several degrees of force; and the list of such causes is not a closed book, but may be extended as occasion arises.

HUSBAND'S petition for dissolution of marriage, claiming damages.

The petitioner, Demetrius Sophocles Constantinidi married the respondent, Julia D. Constantinidi, on October 26, 1889, at the Registry Office, Wandsworth, in the county of London, and they afterwards cohabited together at divers places and at 17, Great Cumberland Place, in the county of London.

The petition, which was dated July 3, 1902, alleged:—

Par. 3: "That the said [respondent] frequently committed adultery with Henry William Lance."

[This paragraph was struck out of the petition in September, 1902.]

Par. 4: "That on the 27th day of February, 1902, the said [respondent] went through a bigamous ceremony of marriage with the said Henry William Lance at Sioux Falls, in the county of Minnehaha, in the State of South Dakota, in the United States of America."

Par. 5: "That from the 27th day of February, 1902, until the present time the said [respondent] has lived and cohabited and habitually committed adultery with the said Henry William

Lance at 631, Tenth Street, Sioux Falls, aforesaid and at divers other places."

Par. 6: "That your petitioner claims 10,000*l.* as damages from the said Henry William Lance in respect of the adultery by him committed as aforesaid."

Particulars of paragraph 5 were delivered on October 7, 1902, pursuant to order dated September 24, 1902. The particulars simply stated various addresses in America where the respondent and co-respondent had stayed together after they had gone through the form of marriage at Sioux Falls.

The respondent, in her answer, which was filed on December 18, 1902, denied (paragraph 1) that the marriage at Sioux Falls was a bigamous marriage, and alleged (paragraph 2) that on February 20, 1902, she "obtained a decree of divorce from the petitioner in open Court at the city of Sioux Falls, in the Second Judicial Circuit of the State of South Dakota, and her said marriage with the petitioner was thereby dissolved."

She denied (paragraph 3) that she was guilty of adultery as alleged in the petition.

In paragraph 4 she alleged that the petitioner had "frequently committed adultery with a woman known as Madame Lester, otherwise Blitz"; and (paragraph 5) that, "on or about the 7th day of August, 1901, at the Continental Hotel, Ostend, the petitioner committed adultery with the said Madame Lester." In paragraph 6 the respondent alleged that the petitioner committed adultery with the same woman on or about the 11th and 14th days of August, 1901, at the Grand Hotel, Ostend; that (paragraph 7) he committed adultery with the same woman on or about the 15th day of August, 1901, at the Ocean Hotel, Ostend; and (paragraphs 7*a*, 8, and 9) that he committed adultery with the same woman at Albany Mansions, Shaftesbury Avenue, in the county of London, on the 30th and 31st August, 1901; the 13th, 18th, 21st, 24th, and 29th September, 1901; and the 3rd, 14th, 15th, and 20th November, 1901.

The respondent prayed the Court to declare that her marriage with the petitioner was duly dissolved on the 20th day of February, 1902; and, in the alternative, she prayed that

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the Court would be pleased to dismiss the petition, and to grant her such further and other relief in the premises as might seem just.

The petitioner in his reply, filed on February 24, 1903, joined issue upon the 1st paragraph of the respondent's answer, and (paragraph 2) he denied that his marriage with the respondent was dissolved by the decree of the American Court, which, he alleged, had no jurisdiction to dissolve his said marriage, he being domiciled in England at the time. He joined issue upon the 3rd paragraph of the said answer; and (in paragraph 4 of his reply, dealing generally with the remaining paragraphs of the answer) "he did not admit that he had committed adultery as alleged in the said answer"; wherefore the petitioner prayed as before.

The co-respondent's answer, filed on December 20, 1902, was in the form of a denial of the adultery alleged in the petition, and a denial that he went through a bigamous marriage as therein alleged. The co-respondent's answer concluded with a prayer for the dismissal of the said petition.

From copies of the file of the proceedings in the American Court, it appeared that the wife there alleged, first, the marriage; secondly, that she was then, and for more than six months next preceding the commencement of those proceedings had been, a resident in good faith of the State of South Dakota; thirdly, that (inter alia) it was bonâ fide her intention to become a citizen of the United States and to renounce and abjure for ever all allegiance and fidelity to all and any foreign prince, potentate, State, or sovereignty whatsoever, and particularly allegiance to Edward VII., King of the United Kingdom of Great Britain and Ireland, of whom she was theretofore a subject; which said oath and declaration were duly entered in the office of the clerk of the Court; and that she had, before action brought, made a similar oath and declaration before the clerk of the county court of the county of Minnehaha, in the same State of South Dakota, which oath and declaration were duly entered in the office of the said clerk; and that, before commencing her action, she was, and still remained, a domiciled resident of the State of South Dakota.

The wife's action and prayer for divorce were grounded on various allegations of cruelty.

The husband was served on November 26, 1901, at the York Hotel, Albemarle Street, London, with notice of the proceedings, but was advised to do nothing in the matter, and the action was determined and decree pronounced in default of his appearance on February 20, 1902. The findings and decree of the Court were (inter alia) that the wife was an actual and bonâ fide resident of the State of South Dakota for more than six months before action brought, and, since taking up her residence in the State of South Dakota more than eight months next preceding the commencement of her said action, had, and still continued to have, in good faith her residence and domicil in the city of Sioux Falls in the said State; that, before commencing her action, she had duly declared, as provided by the laws of the United States of America, her intention to become a citizen of the said United States; and that the husband had "been guilty of extreme cruelty" towards the plaintiff, his wife, and that "such extreme cruelty was and is sufficient in law to entitle the plaintiff to an absolute divorce from the defendant," which the Court accordingly decreed, and thereby "restored" the parties "to the condition of single persons."

In December, 1899, a judicial separation had been pronounced in this Court at the suit of the husband on the ground of the wife's desertion.

The present petition by the husband came on for trial before the President (Sir F. H. Jeune) and a special jury, and it was then proved, and not denied, that the respondent and co-respondent had, since the date of their bigamous marriage, lived together as man and wife. It was also proved that the petitioner had committed adultery with the woman named in the respondent's answer; and counsel for the petitioner in fact admitted, at the close of his case, that the various allegations of adultery set forth in the answer were substantially accurate.

The jury formally found that the petitioner and respondent had committed adultery together, and that the petitioner had also committed adultery. The damages were assessed at 25,000*l*.

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The President gave leave to amend the petition, by the insertion of that figure in place of the 10,000*l.* claimed.

The case then stood over till the following day for argument on these findings.

July 30. *Bargrave Deane, K.C.*, and *Barnard*, for the respondent, applied to the Court to dismiss the petition on the verdict of the jury that the petitioner had committed adultery, and, after reading s. 31 of the Matrimonial Causes Act, 1857, submitted that, in the numerous authorities decided thereunder, the Court in no single case had exercised the discretion thereby conferred, in favour of a husband found guilty of adultery, and, above all, where the guilty party, whether husband or wife, had not gone into the witness-box and given some explanation in extenuation of his or her misconduct.

[THE PRESIDENT. What is the reason which the Legislature may have had in mind in saying that a person guilty of adultery might not have a decree? Was it that the decree should or might be refused in cases where it could be shewn that the man had in some way brought about his wife's misconduct; or was it to be refused in cases where it was shewn that the adultery of the petitioner was neither excusable on the ground of real innocence nor because committed under circumstances which indicated that it was not an act of deliberate adultery? Deliberate adultery could not be excused under any circumstances, one would think.]

*Latour* v. *Latour and Weston* (*the Queen's Proctor intervening*) (1) was one of the earliest cases decided after the Matrimonial Causes Act, 1857, came into operation, and the Judge Ordinary in the course of his judgment said: "I presume the Legislature introduced the clause (s. 31) giving a discretionary power to the Court in order to meet the case of some temporary lapse from purity of conduct on the part of a married man, which might have happened years before, and might have been, as Dr. Lushington expressed it, comparatively venial . . . ." The House of Lords affirmed the

(1) (1861) 2 Sw. & Tr. 524.

decision, though it varied the order of the Judge Ordinary as to costs. (1)

*Hulse* v. *Hulse and Tavernor* (2) was another case in which the petitioner was refused relief.

[THE PRESIDENT. I do not think that case is of much assistance. It turned on whether adultery committed by the petitioner after decree nisi and before decree absolute was sufficient to bar the final decree in the exercise of the discretion conferred upon the Court by s. 31. I am very anxious to find out, if possible, the reason for that section, because it embodies, as far as I can ascertain, a doctrine which is not recognised in any other civilized country where divorce exists.]

*McCord* v. *McCord, Ogle and Coxon* (3) was a case of a single act of adultery committed by the husband with a female with whom he had had immoral relations before his marriage with the respondent. The latter heard of that act of adultery and forgave him on his promise not to see the woman any more. But the Judge Ordinary (Sir James Hannen) dismissed the petition, and, in a carefully considered judgment, stated that he was only aware of two cases in which the Court had exercised its discretion in favour of a petitioner who had been proved to have committed adultery; in the first of those cases, namely, *Joseph* v. *Joseph and Wentzell* (4), the adultery was "what may be called innocent adultery, by marrying again in the mistaken belief that his (petitioner's) wife was dead"; and in the other case, *Coleman* v. *Coleman* (5), "where it appeared to the Court that the petitioner (the wife) had been compelled by her husband to prostitute herself." But nothing could be stronger than *Clarke* v. *Clarke* (6), which was also referred to in the judgment in *McCord* v. *McCord* (7), for a single act of adultery committed by the petitioner after his wife had left him, as he supposed, for ever, was there held by Lord Penzance to be a sufficient ground for refusing a decree even for the incestuous

(1) (1864) 10 H. L. C. 685; 33 L. J. (P. & M.) 89.
(2) (1871) L. R. 2 P. & M. 259.
(3) (1875) L. R. 3 P. & M. 237.
(4) (1865) 34 L. J. (P. & M.) 96.
(5) (1866) L. R. 1 P. & M. 81.
(6) (1865) 34 L. J. (P. & M.) 94.
(7) L. R. 3 P. & M. at pp. 240, 241.

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adultery of the wife. As Sir James Hannen pointed out, "the adultery of the petitioner in that case had not been condoned, for it was not known to the respondent, but, for the same reason, it had not conduced to her guilt"; and, after referring to *Goode* v. *Goode and Hamson* (1), he continued: "Thus it has been decided that neither the fact that the adultery was isolated nor that it had been forgiven will constitute such special circumstances as to justify the Court in departing from that which must be taken to be its rule, not to grant a divorce when the petitioner also has been guilty of adultery. I will not take upon myself to say that under no circumstances will those facts when combined warrant the Court in granting relief to a guilty petitioner, but I can see nothing in this case which should lead me to make this petitioner an exception to the rule." In *Story* v. *Story and O'Connor* (2), another case of condoned adultery, the President (Sir James Hannen) said that the husband was "not entitled to come into this Court and claim release from the bond of marriage, he having shewn himself regardless of the obligations of that state."

[THE PRESIDENT. I have always wished to know on what ground Sir James Hannen put his decision in that case.]

In *Bernstein* v. *Bernstein* (3) the decision in *Story* v. *Story and O'Connor* (2) was approved, but that in *Pomero* v. *Pomero and Hadley* (4) was overruled. In *Synge* v. *Synge* (5) your Lordship said that a man had no right to commit adultery because his wife left him or refused to live with him as his wife.

[THE PRESIDENT. I meant to say that she was morally responsible, as Lord Stowell put it. Here the husband has undoubtedly committed adultery, and, upon that, I have to consider whether it is such adultery that I should exempt him from what, I agree, is the rule. He says: "For that adultery my wife is morally responsible." Is that a good plea to put forward?]

(1) (1861) 2 Sw. & Tr. 253, 258; 30 L. J. (P. & M.) 105.
(2) (1887) 12 P. D. 196, 198.
(3) [1893] P. 292 (Lopes L.J., at p. 307).
(4) (1884) 10 P. D. 174.
(5) [1900] P. 180, at p. 207.

*Latour* v. *Latour* (1) and *Clarke* v. *Clarke* (2) answer that question most distinctly in the negative.

[THE PRESIDENT. I am not aware that any case has yet distinctly decided that moral responsibility of the wife is not an element to be considered. There are, no doubt, reported cases in which the point might have been argued, but I do not think it has ever, in fact, been argued and decided.]

Although there was that moral responsibility on the part of the wife, your Lordship granted her relief in *Synge* v. *Synge*. (3) The Court has laid down fixed principles as the guide in cases of this kind.

[THE PRESIDENT. The Court has nowhere laid down a code of principles. I have always wished that the Court, soon after the Act of 1857, which established it, was passed, had seen its way to lay down a fixed set of principles for the guidance of judges who might be called upon to exercise the discretion conferred by s. 31. But I have never found any such fixed set of principles, nor heard that any such code has been laid down.]

*Symons* v. *Symons* (4) was an extreme case, and was, moreover, a wife's petition.

[THE PRESIDENT. I certainly found that the husband was actually responsible for the wife's adultery: that he drove her to commit it.]

There is, at any rate, no case in which a guilty husband has obtained a decree, except in the instance of so-called innocent adultery.

*Eldon Bankes*, *K.C.*, and *Cassel*, for the co-respondent. The question is whether mere desertion on the part of the wife excused the husband in committing adultery as he did.

[THE PRESIDENT. Desertion, coupled with a strong and just suspicion that it was caused by her preference for another man.]

The desertion by the wife is not material. Before 1857 every act of adultery was a bar to a petitioner in the Ecclesiastical Courts. [He read the argument put forward on behalf

(1) 2 Sw. & Tr. 524.
(2) 34 L. J. (P. & M.) 94.
(3) [1900] P. at p. 207.
(4) [1897] P. 167.

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of the petitioner in *Latour* v. *Latour and Weston* (*the Queen's Proctor intervening*). (1)] It was in answer to that argument that the Judge Ordinary (Sir Cresswell Cresswell) said (2): "I am not casuist enough to consider this as any great palliation of his conduct. I cannot say, sitting in this seat, that a man is licensed to live in adultery with another woman because his wife has deserted him." *Clarke* v. *Clarke* (3) is a direct authority, and there is nothing to qualify it. *Hulse* v. *Hulse and Tavernor* (4), when looked at closely, is also an authority against the petitioner. In *Morgan* v. *Morgan and Porter* (5) it is distinctly stated that the discretion to be exercised by the Court under s. 31 must be a regulated discretion, and that the Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable or capable of excuse. There must be some special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner. Lord Penzance, in his judgment, gives three categories or classes of cases of a very distinct and definite kind, and he says that there may be, and probably are, others. In the present instance, however, the petitioner's adultery cannot be put into any particular category which is capable of distinct statement and recognition. The Court ought not to take the desertion by the respondent into consideration at all.

[THE PRESIDENT. I think that people would say nowadays that those were hard sayings of the learned judge; and I am by no means certain that at the present day, if it were a case of first impression, the Court would say the same.]

Although, before the Act, adultery was an absolute bar, the Legislature gave a discretion to the Court by s. 31; but all the authorities shew the lines on which that discretion is to be exercised, and the Courts have never exercised it except when the adultery comes within a distinct category which excuses it in the eye of the law.

(1) 2 Sw. & Tr. at p. 527.
(2) 2 Sw. & Tr. at p. 529.
(3) 34 L. J. (P. & M.) 94.
(4) L. R. 2 P. & M. 259.
(5) (1869) L. R. 1 P. & M. 644.

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*Lawson Walton*, K.C., and *Priestley*, K.C., for the petitioner. The exercise of the discretion which undoubtedly exists under s. 31 of the Act of 1857 must vary from time to time as society changes. The arguments on the other side go the length of saying that the discretion is limited to the case of a female petitioner. In the present instance the wife, by deserting her husband without reasonable excuse, was guilty of a flagrant breach of the marriage tie, in defiance of the husband's matrimonial rights. He respected the tie for over two years, and then obtained a judicial separation in a suit where no defence or counter-charge was put forward. Her case, even now, is that there was no infidelity on his part before that time. In going to America for the purpose of qualifying for a divorce in that country, she herself took the first step towards getting freed from the very marriage by which she now seeks to keep her husband bound. Cases such as *McCord* v. *McCord, Ogle and Coxon* (1), where the petitioner's adultery was an isolated act, or *Morgan* v. *Morgan and Porter* (2), *Goode* v. *Goode and Hamson* (3), and *Story* v. *Story and O'Connor* (4), where the adultery of the petitioner had taken place years before and had been condoned, only go to shew that the mere facts of the petitioner's adultery being an isolated act, or that it had been committed years before and had been condoned, have been held insufficient to induce the Court to exercise its discretion in favour of the petitioner in the particular cases then under consideration, where the wife's morals had been affected through the husband's previous misconduct.

The real question to be considered is whether the misconduct of the petitioner has conduced to the adultery of the respondent: *Grosvenor* v. *Grosvenor* (5); *Collins* v. *Collins* (6); *Coleman* v. *Coleman*. (7) In *Hulse* v. *Hulse and Tavernor* (8) the point was not taken.

In *Lautour* v. *H. M. Proctor* (9) there had been acquiescence for a period of thirty years. In *Clarke* v. *Clarke* (10) the

(1) L. R. 3 P. & M. 237.
(2) L. R. 1 P. & M. 644.
(3) 30 L. J. (P. & M.) 105.
(4) 12 P. D. 196.
(5) (1885) 34 W. R. 140.
(6) (1884) 9 P. D. 231.
(7) L. R. 1 P. & M. 81.
(8) L. R. 2 P. & M. 259.
(9) 10 H. L. C. 685.
(10) 34 L. J. (P. & M.) 94.

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absence was only temporary; here, the respondent took herself off and has remained away for several years. The petitioner relies upon *Symons* v. *Symons* (*the Queen's Proctor intervening*) (1) [judgment read]. The points for the consideration of the Court in the present instance are the aggravation of the conduct of the respondent, who is asking the Court to refuse a decree, and the fact that her adultery has in no way been caused by the petitioner's misconduct.

*Bargrave Deane, K.C.*, replied, and referred to *Synge* v. *Synge*. (2) A man has no right to commit adultery because his wife deserts him.

*Eldon Bankes, K.C.*, also replied.

*Cur. adv. vult.*

Aug. 10. JEUNE P. In this case adultery was proved to have been committed both by the petitioner and the respondent, and the question is whether, in the exercise of the discretion vested in me by the 31st section of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), I ought to pronounce a decree against the wife. The facts, so far as they are material, are as follow: The parties were married on October 26, 1889. They made the acquaintance of the co-respondent in 1896. Before that time the husband and wife had lived on terms of great affection. But in the autumn of that year the co-respondent and respondent met in the country at the house of her father, whose medical adviser the co-respondent was; and when the husband returned from a visit to Switzerland in October, 1896, a marked coldness was exhibited by the wife towards her husband, and marital intercourse was refused by her. The wife left her husband and went to Ireland in 1897, clearly with the intention of never returning to him. In December, 1899, the husband obtained a decree of judicial separation on the ground of desertion, the wife offering no real defence. In February, 1901, she went to Sioux Falls, in the State of Dakota, and so commenced what was, no doubt, a residence intended to qualify for a divorce under the laws of that State. She obtained such a divorce in February, 1902, and almost

(1) [1897] P. 167. (2) [1900] P. 180; [1901] P. 317.

immediately afterwards married the co-respondent, who had joined her in Dakota, and thenceforward cohabited with him. It was proved that in July and August, 1901, and also in 1902, the husband committed adultery with a woman of loose character. From the facts proved in the case I draw the following conclusions: (1.) That when the wife left the husband in 1897 she did so because she had transferred her affections to the co-respondent, and the petitioner believed this at the time. (2.) That the husband's misconduct did not cause or conduce to that of the wife, inasmuch as, without inferring any act of adultery on her part before the bigamous marriage with the co-respondent, as no such adultery was either directly proved or charged, there can, I think, be no doubt that, at least when she went to Dakota in February, 1901, and probably some time before, she was contemplating an American divorce from her husband, and, consequently, a marriage to and adultery with the co-respondent. (3.) That the wife's conduct in leaving her husband, in order, after an interval, to commit adultery with the co-respondent, may, in the sequence of events, have caused or conduced to the adultery of the husband: how far it did so I shall presently consider.

In *Symons* v. *Symons* (1) I had occasion to consider the exercise of the discretion under s. 31, in a suit by a wife against a husband, in which it was proved that the husband had committed adultery and that the wife had subsequently committed adultery, and in which it was, as I held, also shewn that the husband, by his wilful neglect, had caused, or conduced to, the adultery of his wife. In that case, I thought it my duty to consider carefully the terms of the Act and the authorities bearing on it, and, in the result, I held that the wife was not, by reason of her adultery, disentitled to a decree dissolving her marriage. I do not think it necessary, in the present instance, to repeat the various considerations which I stated on that occasion. But the very able argument of Mr. Lawson Walton having left on my mind the impression that the present case was governed by *Symons* v. *Symons* (1), I

(1) [1897] P. 167.

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reserved my judgment in order that I might carefully reconsider that case and the numerous authorities relating to the matter.

It is not, I think, desirable to allow ourselves to dwell exclusively, or even principally, on those authorities.

The question, after all, is one of the effect to be given to the provisions of s. 31 of the Act of 1857, and the state of the law in view of which that section was enacted.

There can be little or no doubt as to the object of the Legislature in conferring the discretion which is permitted by that section. Before the Act of 1857, the Ecclesiastical Courts with regard to divorce a mensâ et thoro, in cases of mutual misconduct, held fast by the maxim of the canon and also the civil law: "*Viro atque uxore mores invicem accusantibus, causam repudii dedisse utrumque pronuntiatum est: Id ita accipi debet, ut ea lege, quam ambo contempserunt, neuter vindicetur: paria enim delicta mutua pensatione dissolvuntur*" (Digest, 24. 3. 39). How rigidly the Ecclesiastical Courts adhered to this principle may be gathered from the case of *Otway* v. *Otway* (1) in the Court of Appeal. The case of *Proctor* v. *Proctor* (2), decided in 1819, contains, in the judgment of Sir William Scott, a complete exposition of the law of the Ecclesiastical Courts on this subject, and it makes it clear that those Courts proceeded on the fixed, and almost mechanical, principle of compensation or set-off, and did not at all regard the special circumstances of individual cases.

I pointed out in *Symons* v. *Symons* (3) that the House of Lords took a very different course, and always inquired into the conduct of a petitioner seeking a divorce, refusing relief if it was shewn that there had been on his part a want of due care and caution. I came then to the conclusion, to which I now adhere, that the intention of the Legislature was to correct the over-rigid procedure of the Ecclesiastical Courts, and, in preference, to follow the more elastic and juster procedure of the House of Lords; and, with this intention, they

(1) (1888) 13 P. D. 141. (2) (1819) 2 Hagg. Cons. 292.
(3) [1897] P. 167.

conferred a discretion on the Divorce Court, without imposing specifically any limitation or any directions with regard to its exercise.

It is quite true that in *Morgan* v. *Morgan and Porter* (1) Lord Penzance used language, repeated with approval in subsequent cases by Sir James Hannen and Butt J., which has been considered to impose special restrictions on the discretion of the Court and to render it imperative, in every case, to proceed on some specific principle. But I think that those restrictions are more apparent than real. If it is remembered that the causes, for which the Court may, in the exercise of its discretion, allow a divorce notwithstanding misconduct by a petitioner, are to be taken in combination and according to their several degrees of force, and also that the list of such causes is not a closed book, but may be extended as occasion arises, I think that the expressions used by the learned judges whom I have mentioned will be seen not to amount to more than an emphatic assertion of the grounds on which, and the manner in which, a judicial, as opposed to an arbitrary, discretion should, in any and every case, be exercised. It is not, I think, easy to understand why the Legislature, having determined to abrogate the fixed rule of the Ecclesiastical Courts, still thought it desirable to maintain the refusal of a divorce to petitioners guilty of misconduct, and to insist on retaining within the bonds of matrimony two persons both of whom have been unmindful of their marriage vows; and, therefore, it is difficult to conjecture with any confidence the principles upon which the Legislature intended that judges should act in the exercise of the discretion conferred on them, of the nature of which principles the Legislature abstained from giving any indication. I think, therefore, one can find guidance only by reference to general principles of justice, and no principles of justice in regard to this matter seem to me clearer than these: first, that a petitioner who has been convicted of adultery should not be allowed to obtain a divorce if such adultery in any serious degree contributed to the misconduct of the

(1) L. R. 1 P. & M. 644.

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respondent; and, secondly, that a respondent should not be allowed to avoid the consequences of proved misconduct by putting forward an act or acts of misconduct on the part of the petitioner for which the respondent was, himself or herself, in any serious degree responsible. To hold otherwise would be to allow a wrong-doer to profit by wrong-doing. I have no doubt that the Legislature intended that the Court should act on these principles, whether or no it intended that the Court should act on any other principles.

On these grounds I had no hesitation in *Symons* v. *Symons* (1) in coming to the conclusion, to quote the head-note in that case, that "the circumstances to be considered by the Court in exercising its discretion under s. 31 of the Divorce and Matrimonial Causes Act, 1857, to grant a divorce to a wife who has been guilty of adultery, include the case of the husband causing or conducing to her adultery by his own wilful neglect or misconduct." I do not, of course, forget that in *Hulse* v. *Hulse and Tavernor* (2), when the adultery of the petitioner was committed after the decree nisi, it might, in the above view, have been contended that the divorce should be allowed because the adultery of the petitioner was probably caused, in some degree, by the adultery of the respondent. But in fact no such point was raised, the petitioner being content, I presume, to rely on the argument that misconduct after decree nisi was not misconduct during the marriage, within the meaning of the 31st section. I am of opinion that the present case is in law governed by *Symons* v. *Symons*. (1)

I am quite unable to accept the argument pressed upon me, especially by Mr. Barnard, that a husband and a wife are in a different position of responsibility, each to the other, and that a guilty wife would be entitled to escape a divorce on account of misconduct on the part of her husband, even if she actually and directly caused it. No doubt the case of a wife going so far as this is improbable, though not inconceivable, and no doubt also the cases in which a husband has been allowed a divorce in spite of adultery by him are extremely rare. But,

(1) [1897] P. 167. (2) L. R. 2 P. & M. 259.

in principle, I must decline to draw any distinction between the responsibility of the sexes in this respect, and I know of no authority for doing so.

The law, therefore, appears to me clear; but there remains the question whether, on the facts, it is shewn in the present case that the respondent conduced to the adultery committed by the petitioner.

I think that the verdict of the jury goes a long way to decide this question, because they could not have given the decision they did unless they were satisfied that when the respondent left the petitioner in 1897 she was already under the influence of the co-respondent, and had in fact then transferred her affection to him. But I do not think I am bound by the decision of the jury in this matter, though I agree with it; and, forming my own opinion, I cannot for a moment doubt that the petitioner was quite right in what he told us was his belief—that his wife had yielded to the co-respondent, whether to the extent of actual adultery or not I do not pause to consider, before his return from Geneva in October, 1896, and that when she deserted him in 1897 she was unfaithful to him in heart and intention, though perhaps not then in person. Under these circumstances, did the wife's conduct conduce to the subsequent adultery of the husband? I have in *Synge* v. *Synge* (1), and I think also in other cases, repudiated, as emphatically as I could, the suggestion that a wife who refuses directly, or virtually by desertion, the matrimonial rights of her husband, thereby justifies him in committing adultery, or can properly be said to cause his so doing by such refusal. But when a wife not only leaves her husband, but does so because she has transferred her affection to another man, and her husband believes this to be the case, and is right in his belief, I cannot bring myself to say that she has not conduced to misconduct on his part. What in fact has she done? She has made his life solitary. She has shattered his ideals of the purity of womanhood and of his wife. She has set him a glaring example. She has deprived him of what is to most men the strongest, to some men probably the only, safeguard

(1) [1900] P. 180.

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of their virtue—respect for the mutual obligations of married life and respect for the woman whose love and honour and happiness are in their keeping. After the respondent left the petitioner for no reason, as I believe, except her intention to be unfaithful to him, I do not think she can be heard to say that she is not in a very serious degree responsible for the misconduct of her husband afterwards—and it is to be remarked it was apparently a long time afterwards, when all hope of reconciliation must have vanished—falling a victim to the wiles of a professional seductress.

In this case I do not think it necessary to rely on a point pressed on me—that unless a divorce be granted, the pecuniary relations of the husband cannot be adjusted, and that the large property of the wife will, in whole or part, fall into the hands of the seducer. No such principle has ever, so far as I know, been invoked, and I do not discuss it now; but I do not wish to say that, in a future case, it may not be admissible. On the whole, therefore, I am of opinion that this is not a case in which I ought to refuse to the petitioner the relief to which his wife's infidelity has entitled him, and there will be a decree nisi, with costs.

Solicitors for petitioner: *Hollams, Son, Coward & Hawksley.*
Solicitors for respondent and co-respondent: *Lewis & Lewis.*

H. D. G.

## PAINE *v.* PAINE.

1903
Oct. 30.

*Desertion — Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5— *Condonation—Revival.*

Desertion by not complying with a decree for restitution of conjugal rights may, after condonation, be revived by adultery committed by the party who was guilty of the statutory desertion.

PETITION by wife for dissolution of marriage on the ground of adultery coupled with desertion.

The desertion alleged was non-compliance with a decree for restitution of conjugal rights, pronounced on February 4, 1902.

It appeared that the respondent left the petitioner in September 1901, and shortly afterwards wrote to her saying that he was going abroad with a woman whom he named, and that nothing would alter his determination.

The petitioner entreated him to return to her; but, as he refused, she in due course petitioned for restitution of conjugal rights.

Having obtained her decree in that suit, the petitioner in March, 1902, filed a petition for divorce, alleging statutory desertion under s. 5 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), coupled with adultery.

While that petition was pending, the petitioner forgave her husband, and resumed cohabitation with him on his promise to give up the woman with whom he had been living in adultery.

The petition was, by consent, dismissed.

Upon the petitioner discovering subsequently that the respondent was associating with the woman in question, there was an angry scene between them, and the petitioner told the respondent that either he or she (the petitioner) must leave the house. He said he would be the party to go, and he accordingly left on February 10, 1903, after informing the petitioner that he would not return.

Since then no communication had taken place between them; and, in March 1903, the present petition for dissolution of marriage was presented.

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The respondent appeared, and put in an answer denying both the desertion and adultery; but at the hearing he did not contest the case.

*Priestley, K.C.* (*Barnard* with him), for the petitioner. The only point is whether statutory desertion which has been condoned can be revived by subsequent adultery. Desertion other than statutory desertion would be so revived: *Blandford* v. *Blandford.* (1) It is submitted that the statutory desertion under the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5, is as effectual for all purposes as desertion for two years and upwards under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85): *Bigwood* v. *Bigwood.* (2)

*Le Bas*, for the respondent, did not argue, and stated that the respondent did not oppose a decree.

GORELL BARNES J. assented to the view put forward on behalf of the petitioner, and pronounced a decree nisi with costs.

Solicitors: *Norris & Norris; Keen, Rogers & Co.*

(1) (1883) 8 P. D. 19.

(2) (1888) 13 P. D. 89.

H. D. G.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1903, will be as follows:—

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**DIVORCE**—*Condonation—Adultery—Desertion—Revival—Decree of Dissolution of Marriage.*

Desertion for two years without reasonable excuse revives condoned adultery.

Where a husband was guilty of incestuous adultery, which was condoned by the wife, and he was afterwards guilty of desertion:—

*Held*, that the desertion revived the condoned adultery, and that the wife was entitled to a decree dissolving her marriage. HOUGHTON *v.* HOUGHTON - - - Bucknill J. 150

2. —— *Desertion—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5—*Condonation—Revival.*

Desertion by not complying with a decree for restitution of conjugal rights may, after condonation, be revived by adultery committed by the party who was guilty of the statutory desertion. PAINE *v.* PAINE - Gorell Barnes J. 263

3. —— *Maintenance — Permanent Maintenance—Lump Sum—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

The Court has no power to order a lump sum to be paid over to the petitioner by way of permanent maintenance. TWENTYMAN *v.* TWENTYMAN - - - - Jeune Pres. 82

4. —— *Practice—Act on Petition—Mode of Trial—Jury—Discretion of Court—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 28, 36—*Divorce Court Rules, December*, 1865, *r.* 61.

Notwithstanding rule 61 of the Divorce Court Rules, 1865, the Court has a discretion whether

**DIVORCE**—*continued.*

an act on petition shall or not be tried with a jury.

Decision of the President (Sir F. H. Jeune) affirmed. LÖWENFELD *v.* LÖWENFELD **C. A. 177**

**5.** —— *Practice—Consolidated Suits for Judicial Separation and Dissolution—Power to hear in Camerâ.*

The Court possesses inherent jurisdiction to order any case to be heard in camerâ.

In a suit for judicial separation by a wife, the particulars in which disclosed allegations of filthy practices, but in which no suggestion was made of sodomy or bestiality, the Court, notwithstanding the fact that with the wife's suit had been consolidated a suit by the husband for dissolution of the marriage on the ground of the wife's adultery with the co-respondent, ordered, with the consent of all the parties, that the case should be heard in camerâ by a judge sitting with a special jury. D. *v.* D. D. *v.* D. AND G.

**Jeune Pres. 144**

**6.** —— *Practice—Costs—Intervener—Successful Defence.*

Upon a wife's petition for dissolution of marriage, the husband filed an answer denying all the charges made against him in the petition, but, when the case was in the paper for hearing, upon an application being made on behalf of the petitioner for a short adjournment, counsel for the husband stated that he was not in a position to defend the suit so far as the charges of desertion and adultery were concerned.

An application was thereupon made on behalf of a person named in the petition that she might have leave to intervene and defend herself in respect of the particular charge of adultery with which her name was associated, and the Court gave leave accordingly.

Upon the case coming on for hearing, the charge of adultery was disproved, but the wife was granted a judicial separation on the ground of the respondent's desertion.

Upon the question arising as to costs:—

*Held*, that, under the circumstances, the Court ought to place the intervener in the best possible position to obtain the costs of her successful intervention, and that an order should be made in her favour against both the petitioner and the respondent. WADE *v.* WADE (BROOKE INTERVENING) - - - **Gorell Barnes J. 16**

**7.** —— *Practice—Husband's Suit—Adultery of Petitioner — Discretional Bar—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Decree.*

In a husband's suit for dissolution of marriage, upon findings of fact that the petitioner and respondent had both committed adultery, the Court, finding as a further fact that the adultery of the petitioner had not conduced to the adultery of the respondent, exercised in favour of the petitioner the discretion conferred by the Matrimonial Causes Act, 1857, s. 31, and pronounced a decree nisi, dissolving the marriage.

Although the discretion conferred by s. 31 is a judicial and not an arbitrary discretion, the causes for, and the circumstances under, which the Court may exercise its discretion in favour of a guilty petitioner are to be taken in combination

**DIVORCE**—*continued.*

and according to their several degrees of force, and the list of such causes is not a closed book, but may be extended as occasion arises. CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE

**Jeune Pres. 246**

**8.** —— *Practice—Husband's Petition—Wife's Adultery — Passive Acquiescence on Husband's Part—Conduct conducing to Adultery—Refusal of Decree.*

Where, in a petition for divorce by the husband on the ground of his wife's adultery, it appeared that he had taken no steps beyond mere verbal remonstrances to terminate a course of conduct on the part of his wife and the co-respondent, which, if it did not bring about actual adultery at the time, eventually resulted in it:—

*Held*, that the petitioner was not entitled to relief, and that the petition should be dismissed. ROBINSON *v.* ROBINSON AND DEARDEN

**Bucknill J. 155**

**9.** —— *Practice — Pleading — Custody of Children—Paternity.*

If a wife, respondent in a suit for dissolution of marriage, wishes to raise any question as to the paternity of any child or children whose custody is claimed by the husband (petitioner), she must file an answer in the suit specifically raising the question as to the paternity of such child or children; and, unless she so plead, she will not be allowed at the hearing to raise any question as to the paternity, in opposition to her husband's application for custody of such child or children. GORDON *v.* GORDON **Jeune Pres. 92**

**10.** —— *Settlements, Variation of—Nullity Suit—Decree.*

Without deciding whether an ante-nuptial settlement came to an end upon a decree absolute for nullity of the marriage being pronounced, the Court, being of opinion that all points affecting the settlement should be dealt with finally and forthwith, ordered that the interest of the respondent (husband) in the fund settled on behalf of the petitioner (wife) should be extinguished, and that the fund settled by the respondent should, subject to payment thereout by the trustees of their costs and the costs of the petitioner, be handed over to the respondent. ATTWOOD (OTHERWISE POMEROY) *v.* ATTWOOD

**Gorell Barnes J. 7**

**11.** —— *Settlement, Variation of—Order—Power of Court to rectify—Nullity of Marriage.*

Where a mistake has been made in drawing up an order the Court or a judge has power to alter it, even where it is under appeal and though the request for alteration be made by the party who has given notice of appeal against the order as drawn up. E. *v.* E. - - **Jeune Pres. 88**

**DIVORCE COURT RULES, December, 1865, r. 61.** *See* DIVORCE. 4. **177**

**DOMICIL** — Administration — Grant to foreign administrators—Executors passed over. *See* PROBATE. 2. **125**

**ECCLESIASTICAL LAW** — *Faculty — Inscription on Tombstone in Parish Churchyard—Prayers for the Dead—Removal from Tombstone of Inscription*

**ECCLESIASTICAL LAW**—*continued.*

*apparently placed there as an Invitation for Prayers for the Relief of the Souls of deceased Persons named thereon from pains of Purgatory—Vestry—Control of Incumbent over Inscriptions on Tombstones — Presumption — Discretion of Ordinary—Court Fees.*

The incumbent of a parish church objected to the retention on a newly erected tombstone in the parish churchyard of an inscription which had been placed there without his consent or the sanction of a faculty, and the material portion of which consisted of the following words: "Of your charity pray for the repose of the souls of the beloved son, of . . . . and . . . . , died . . . . also of . . . . , son of the above . . . . , died . . . . On whose souls sweet Jesus have mercy"; and subsequently applied to the Ordinary for a faculty for the removal of the tombstone out of the churchyard. The parishioner who had caused the tombstone to be erected appeared as respondent in the suit, and, further, himself instituted a suit praying for a confirmatory faculty confirming the erection of the tombstone and its retention in the churchyard with the above inscription on it. The two suits were heard together, and at the hearing it appeared that the deceased persons named on the tombstone were members of a Roman Catholic family, and that the inscription had been composed as being the usual inscription placed on tombstones erected to the memory of Roman Catholics:—

*Held*, that the onus of satisfying the Court that the inscription was in all respects unobjectionable lay upon the petitioner for the confirmatory faculty, and had not been discharged; that the evidence supported the presumption that the inscription was intended to be an appropriate one in memory of Roman Catholics, and in regard to prayers for the dead in conformity with the doctrine of purgatory as recognised and enjoyed by the Roman Catholic Church, and that the Court, whilst declining on these grounds and the further ground that the churchwardens and those parishioners who were members of the Church of England entertained conscientious objections to the retention of the inscription, to decree a confirmatory faculty, must decree a faculty to issue to the incumbent authorizing him to remove the tombstone from the church.

Inscriptions proposed to be placed on the tombstones in a parish churchyard are in the first instance subject to the control of the incumbent of the parish, but any decision come to by him may be reviewed by the Ordinary on proper application being made to the Ecclesiastical Court of the diocese.

The solicitors in ecclesiastical suits are as officers of the Court personally responsible for and bound to pay into the registry the Court fees incurred by them on behalf of their respective clients; but the solicitor having so paid the fees is entitled, if his client is successful in the suit, to obtain an order on the unsuccessful party to recoup him for the payments made by him. PEARSON *v.* STEAD. STEAD *v.* PEARSON

**Consist. Ct. of Ripon 66**

**2.** —— *Faculty—Interest—Parishioner of New Ecclesiastical Parish — Lord Blandford's Act,*

**ECCLESIASTICAL LAW**—*continued.*

(19 & 20 *Vict. c.* 104), *s.* 15—*Right of Non-resident Ratepayer to promote Faculty Suit for Removal of Illegal Ornaments from Parish Church—Stations of the Cross—Confessional Boxes—Crucifixes—Tabernacles—Holy Water Stoups—Images of the Good Shepherd, the Virgin Mary, and the Sacred Heart and St. Joseph — Hearing of Suit after Prohibition quousque—Decree.*

The opponents in a cause of faculty instituted in the Consistory Court of Chichester for the purpose of obtaining a faculty for the removal from a parish church in the diocese of Chichester of certain ornaments and articles of church furniture objected to as illegal, after denying in their answer that the promoter was a parishioner or resident inhabitant of the parish, and submitting that he had therefore no interest cognizable by the Court, alleged therein that before any decision or final determination of the suit the Bishop of Chichester should be first consulted and his consent had, and earnestly craved his judgment in the premises, and complained and supplicated that the bishop should examine and determine the cause in his own proper person. The Chancellor of the diocese heard the cause sitting alone, the bishop not being present, and, the petitioner having objected to the bishop being consulted, determined it, delivering judgment without consulting the bishop, holding that the petitioner had a sufficient interest to promote the suit, and dealing with the merits of the case. Subsequently, a writ of prohibition having issued prohibiting the Chancellor from proceeding with the cause until he had consulted the bishop and obtained his consent to hear, decide, and determine the suit, the bishop authorized the Chancellor to hear, decide, and determine the suit. Thereupon a second hearing of the suit took place before the Chancellor; the pleadings filed and the evidence taken on the former proceedings being treated as filed and taken anew, and additional oral evidence being given both on the question of interest and on the merits; the substance of the evidence on the question of interest being that the parish church was a new parish church within a separate ecclesiastical parish formed under Lord Blandford's Act; that the petitioner at the date of his petition, and thenceforth during the proceedings in the suit, was a weekly tenant of a six-roomed house in this ecclesiastical parish, five rooms in which he underlet, keeping in his own occupation one room into which he occasionally went, but where he had never slept; that the house had been taken by him for the sole purpose of giving him a locus standi to bring the suit; and that he was entered in the rate-book of the civil parish out of which the ecclesiastical parish had been formed from before the commencement of the suit up to the time of the hearing, and had paid all rates due and payable by him during that period:—

*Held*, that the petitioner had a sufficient interest to entitle him to promote the suit:

*Held*, also, that a faculty must issue authorizing the promoter to remove from the parish church the following ornaments and articles of church furniture objected to as illegal:—

(1.) Fourteen Stations of the Cross hanging on the walls of the church.

**ECCLESIASTICAL LAW**—*continued.*

(2.) Three confessional boxes.

(3.) All the crucifixes in the church with any canopy or crown over any of them.

(4.) The Tabernacle on or over the Communion Table in the chancel and the lamp burning before it; also the Tabernacle on or over the Communion Table in the side chapel used for the reservation of the Sacrament and the light burning before it.

(5.) Two movable holy water stoups.

(6.) The following images and accessories: The image of the Good Shepherd on a pedestal at the west end of the church, and the candles on each side of it and the lighted lamp in front of it. The image of the Virgin Mary on a pedestal against the chancel screen, and the candles on each side of it and the vases of flowers, and the lighted blue lamp in front of it and the curtain and canopy or crown or star over it. The images of the Sacred Heart and St. Joseph on either side of the Communion Table in the side chapel.

Legal validity given to the decision of the Chancellor of the Diocese of Chichester in *Davey* v. *Hinde*, [1901] P. 95. DAVEY *v.* HINDE
**Consist. Ct. of Chichester P. 221**

**"EFFECTS"**—Soldier's will—"Effects" to be "credited" - - - - 243
*See* PROBATE. 6.

**EVIDENCE** — Colonial marriage — Malta — Evidence of validity - - - 157
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—— Paternity—Custody of child - - 141
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**EXECUTOR**—Probate.
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**FACULTY**—Inscription on tombstone in parish churchyard—Control of incumbent 66
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—— Interest—Right of non-resident ratepayer to promote faculty suit - - 221
*See* ECCLESIASTICAL LAW. 2.

**FOG**—Collision—Fog signal forward of beam—Duty to stop engines - - 114
*See* SHIPPING. 5.

**FOREIGN CO-DEFENDANT**—Service out of jurisdiction — Writ — "Necessary or proper party" - - - - - 18
*See* SHIPPING. 2.

**FOREIGN COUNTRY**—Action in this country for declaration of rights to assist action in—Staying proceedings—Mortgage - 95
*See* SHIPPING. 8.

**FOREIGN DOMICIL** — Administration — Grant to foreign administrators — Executors passed over - - - - 125
*See* PROBATE. 2.

**FOREIGN SHIP** — Wages — Disbursement — Lex loci—Lex fori—Maritime lien - 44
*See* SHIPPING. 13.

—— Wages—Repairs—Maritime lien—Priority —Necessaries - - - 26
*See* SHIPPING. 14.

**FOREIGN VESSEL**—Outside limits of territorial jurisdiction—Collision—Fog - 114
*See* SHIPPING. 5.

**FRAUD** — Will — Undue influence and fraud unsuccessfully pleaded — Costs out of the estate - - - - 239
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**GRANT OF ADMINISTRATION.**
*See* Cases under PROBATE.

**HUSBAND AND WIFE** — Custody of child — Paternity—Evidence - - 141
*See* INFANT.

—— Divorce.
*See* under DIVORCE.

**IN CAMERÂ**—Power to hear—Divorce—Practice
*See* DIVORCE. 5. 144

**INCORPORATION**—Will and codicils - 131
*See* PROBATE. 3.

**INDUSTRIAL SOCIETY** — Will — Nomination paper - - - - 12
*See* WILL.

**INFANT** — *Custody of Child — Paternity — Evidence.*

In the case of a child born in wedlock, as to whose paternity questions are raised upon an application as to the child's custody, if the husband could, from circumstances of time, place, and health, have had nuptial intercourse with his wife, the mother of the child, and it be not proved that he did not have such intercourse, he must be considered the father of her child, even if she were shewn to have committed adultery with any number of men.

Sexual intercourse between man and wife must be presumed, and nothing except evidence that the husband did not have such intercourse at the period of conception can bastardise a child born in wedlock.

Upon the authority of *Favard* v. *Favard*, (1896) 75 L. T. 664, a writ of attachment and a committal order were directed to be issued, upon the ex parte application of the petitioner, against the respondent, who had taken the child out of the jurisdiction. GORDON *v.* GORDON AND GRANVILLE GORDON - - - **Jeune Pres. 141**

—— Custody of children—Practice—Pleading—Paternity - - - - 92
*See* DIVORCE. 9.

**INSCRIPTION**—On tombstone in parish churchyard—Control of incumbent - 66
*See* ECCLESIASTICAL LAW. 1.

**INTERVENER** — Divorce — Practice—Successful defence—Costs - - - 16
*See* DIVORCE. 6.

**JURISDICTION**—Service out of—Writ—Foreign co-defendant - - - 18
*See* SHIPPING. 2.

**JURY**—Practice—Act on petition—Mode of trial —Discretion of Court - - 177
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**LIABILITY**—Limitation of—Time for entry—Life claims—Property claims - 55
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**LIEN** — Maritime — Foreign ship — Wages — Disbursements—Lex loci—Lex fori 44
*See* SHIPPING. 13.

—— Maritime—Foreign ship—Wages—Repairs—Priority—Necessaries - - 26
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**LIFEBOAT**—Salvage—Information by one person leading to a salvage service by another person - - - - 160
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**LIMITATION OF LIABILITY**—Time for entry—Life claims—Property claims - 55
*See* SHIPPING. 6.

**LONDON** — Collision — Compulsory pilotage — Exemption — London district — "Constant trader" - - - 203
*See* SHIPPING. 4.

**MAINTENANCE** — Permanent maintenance — Lump sum - - - - 82
*See* DIVORCE. 3.

**MALTA**—Colonial marriage—Evidence of validity—Practice - - - - 157
*See* MARRIAGE.

**MARITIME LIEN**—Foreign ship—Wages—Disbursements—Lex loci—Lex fori - 44
*See* SHIPPING. 13.

—— Foreign ship—Wages—Repairs—Priority—Necessaries - - - - 26
*See* SHIPPING. 14.

**MARRIAGE**—*Colonial Marriage—Malta—Evidence of Validity—Practice—Matrimonial Suit.*

In a matrimonial suit, where there is a practical difficulty in the way of a petitioner adducing the usual evidence of a lawyer who is or has been practising in the Courts of the Colony where the marriage of the petitioner was celebrated, the Court may accept the evidence of a gentleman who, not as a mere amateur, but from his professional research and experience in relation to the marriage laws of the Colony in question, is, in the opinion of the Court, sufficiently qualified to express an opinion as to the validity of a marriage there celebrated. WILSON *v.* WILSON
**Jeune Pres. 157**

**MATRIMONIAL CAUSES ACT**—Act on petition—Mode of trial—Discretion - 177
*See* DIVORCE. 4.

—— Divorce — Desertion — Condonation — Revival - - - - - 263
*See* DIVORCE. 2.

—— Divorce—Husband's suit—Adultery of petitioner—Discretional bar—Decree 246
*See* DIVORCE. 7.

—— Maintenance, Permanent—Lump sum 82
*See* DIVORCE. 3.

**MERCHANT SHIPPING.**
*See* Cases under SHIPPING.

**MORTGAGE**—Foreign ship—Wages—Disbursements—Maritime lien - - 44
*See* SHIPPING. 13.

**MORTGAGE**—*continued.*

—— Staying proceedings—Action in this country for declaration of rights to assist action in foreign country - - - 95
*See* SHIPPING. 8.

**NECESSARIES**—Foreign ship—Maritime lien—Wages—Repairs—Priority - - 26
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**NEGLIGENCE**—Damage to cargo—Negligence of stevedore in discharge - - 194
*See* SHIPPING. 1.

**NOMINATION**—Will — Nomination paper—Industrial societies - - - - 12
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**NULLITY**—Decree—Nullity Suit—Variation of settlements - - - - 7
*See* DIVORCE. 10.

—— Settlement, Variation of—Order—Power of Court to rectify - - - 88
*See* DIVORCE. 11.

**PARTIES**—"Necessary or proper party"—Writ—Foreign co-defendant—Service out of jurisdiction - - - - 18
*See* SHIPPING. 2.

**PATERNITY**—Evidence—Custody of child 141
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—— Practice—Pleading—Custody of children
*See* DIVORCE. 9. 92

**PILOTAGE**—Belgian law — Collision in river Scheldt—Compulsory pilotage—Liability of owner - - - - 77
*See* SHIPPING. 7.

—— Compulsory pilotage—Exemption—London district—"Constant trader"—Collision
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**PRACTICE**—Divorce.
*See* Cases under DIVORCE.

—— Ecclesiastical law—Hearing of suit after prohibition quousque—Decree - 221
*See* ECCLESIASTICAL LAW. 2.

—— Pleading—Custody of children—Paternity
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—— Probate.
*See* under PROBATE.

—— Service out of jurisdiction—Writ—Foreign co-defendant—"Necessary or proper party" - - - - 18
*See* SHIPPING. 2.

—— Staying proceedings—Mortgage—Action in this country for declaration of rights to assist action in foreign country - 95
*See* SHIPPING. 8.

—— Trial, Mode of—Jury—Discretion of Court—Act on petition - - - 177
*See* DIVORCE. 4.

**PRESUMPTION**—Collision—Statutory presumption of fault—Foreign vessel outside limits of territorial jurisdiction - 114
*See* SHIPPING. 5.

**PRIORITY** — Foreign ship—Wages—Repairs—Maritime lien—Necessaries - 26
*See* SHIPPING. 14.

**PROBATE**—*Citation of next of kin—Administration, with Will annexed—Specific Legatee—Limited Grant—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

The Court, without requiring citation of next of kin, made a limited grant of administration, with will annexed, under s. 73, to the sole beneficiary named in the will.

*In the Goods of Jenny Watson*, (1858) 1 Sw. & Tr. 110, followed. IN THE GOODS OF BALDWIN
**Gorell Barnes J. 61**

2. —— *Foreign Domicil — Administration — Will — Grant to Foreign Administrators — Executors passed over—Practice—Belgium.*

The Court will follow the grant of the foreign domicil, unless the administrators appointed by the foreign Court are, by the law and practice of this country, personally disqualified from taking a grant here.

Thus, where a testator died domiciled in Belgium, leaving a will and codicil in English form appointing executors, and also leaving a Belgian will, the Court made a grant of administration with all three documents annexed in favour of two persons who had been appointed administrators of the deceased's estate abroad, in accordance with the law of the domicil. IN THE GOODS OF MEATYARD - **Jeune Pres. 125**

3. —— *Incorporation—Will and Codicils.*

The testator made a will in 1894, and a holograph codicil in 1898, both duly executed and attested.

The will of 1894 had been settled by his conveyancing counsel, whom he had known for many years, and who had transacted much of his private business.

In 1902 a codicil was drawn by a confidential clerk of the testator to what the clerk believed to be the last will of the deceased, the testator having vouched that he had executed a will, though without giving any date; and the clerk, assuming that such a will had been executed, based it on an incomplete draft handed to him by the deceased.

This codicil was duly executed and attested, the testator saying, "This is a codicil to my last will." It carried out his wishes, so far as it went; but some points, as to which the testator was still undecided, were left over for further consideration. The testator died shortly after executing this codicil:—

*Held*, that the will of 1894, the codicil thereto of 1898, and the document executed as a codicil in 1902, were all to be admitted to probate. EYRE *v.* EYRE (BOOKER AND EYRE INTERVENING)
**Bucknill J. 131**

4. —— *Practice — Administration — Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—"*Special Circumstances*" — *Person Missing entitled in priority to Applicant.*

The "special circumstances" of each particular case are to be considered by the Court in granting or refusing administration under s. 73 to a person not primarily entitled to a grant; and, where the "special circumstances" justify the conclusion that the person who would be entitled in priority to the applicant may reasonably be presumed to be dead, the Court should grant administration to the applicant upon his swearing that he believes himself to be the next of kin of the deceased.

*In the Goods of Pridham*, (1889) 61 L. T. 302, explained.

*In the Goods of Reed*, (1874) 29 L. T. 932, and *In the Goods of Callicott*, [1899] P. 189, approved and followed. IN THE GOODS OF CHAPMAN
**Jeune Pres. 192**

5. —— *Practice—Costs out of the Estate—Will — Undue Influence and Fraud unsuccessfully pleaded.*

Where the facts surrounding the making of a will bring the case within the principles laid down in *Brown* v. *Fisher* (1890) 63 L. T. 465, *Fulton* v. *Andrew*, (1875) L. R. 7 H. L. 448, and *Tyrrell* v. *Painton*, [1894] P. 151, and impose upon the party propounding the will, not merely the onus of proving due execution and testamentary capacity, but the additional burden of removing the suspicion attaching to the making of the will, a person opposing it is primâ facie justified in pleading undue influence and fraud, and, though unsuccessful, ought not to be condemned in costs unless the circumstances of the case be such as to render it unreasonable for him to raise such issues.

Where a defendant put forward those pleas and failed, the Court, following the case of *Orton* v. *Smith*, (1873) L. R. 3 P. & M. 23, ordered that the costs of the defendant, as between party and party, be allowed out of the estate, after the plaintiff, who succeeded in discharging the additional onus of proof cast upon her in the case, should have first taken her costs, as between solicitor and client, out of the estate. WILSON *v.* BASSIL - - - - **Walton J. 239**

6. —— *Soldier's Will — "Effects" to be "credited" — Wills Act* (1 *Vict. c.* 26), *s.* 11.

A declaration, made by a soldier on active service at the instance of the military authorities, who made a note of it at the time, to the effect that in the event of his death he desired his "effects" to be "credited" to one of his sisters (named):—

*Held*, to be a valid testamentary document. IN THE GOODS OF SCOTT - **Jeune Pres. 243**

7. —— *Sureties — Administration — Special Circumstances—Sureties dispensed with.*

While the Court has no power to give leave to a proposed administratrix to carry on the deceased's business, it may, under special circumstances and for good cause shewn, allow her a free hand in the administration, by dispensing with sureties to the administration bond, and by accepting the personal bond of the proposed administratrix for the administration of the estate according to law. IN THE GOODS OF CORY
**Jeune Pres. 62**

**PROHIBITION**—Hearing of suit after prohibition quousque—Decree - - **221**
*See* ECCLESIASTICAL LAW. 2.

**RECTIFICATION** — Settlement, Variation of—Order — Power of Court to rectify — Nullity - - - - - **88**
*See* DIVORCE. 11.

**REPAIRS** — Foreign ship — Wages — Maritime lien—Priority—Necessaries - 26
*See* SHIPPING. 14.

**REVIVAL** — Condonation—Adultery—Desertion —Decree of dissolution of marriage 150
*See* DIVORCE. 1.

—— Desertion—Condonation - - 263
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**RIVER SCHELDT** — Collision in — Compulsory pilotage—Liability of owner—Belgian law - - - - - 77
*See* SHIPPING. 7.

**RULES OF SUPREME COURT**:—Order XI., r. 1 (*g*)—*Service out of the Jurisdiction*
*See* SHIPPING. 2. 18

—— Order XXV., r. 5—*Proceedings in lieu of Demurrer* - - - - 95
*See* SHIPPING. 8.

**SALVAGE**—Agreement under compulsion to pay an exorbitant sum - - - 184
*See* SHIPPING. 9.

—— Constructive acceptance of service - 106
*See* SHIPPING. 10.

—— Lifeboat crew—Information by one person leading to a salvage service by another person - - - - 160
*See* SHIPPING. 11.

—— Standing by—Attempting to tow—Services rendered at request - - 166
*See* SHIPPING. 12.

**SERVICE**—Out of the jurisdiction — Writ—Foreign co-defendant - - 18
*See* SHIPPING. 2.

**SETTLEMENT** — Variation of—Nullity suit—Decree - - - - 7
*See* DIVORCE. 10.

—— Variation of—Order—Power of Court to rectify—Nullity - - - 88
*See* DIVORCE. 11.

**SHIPPING**—*Cargo, Damage to — Negligence of Stevedore in Discharge — Charterparty — Construction of Exceptions—"All other Accidents"—"Negligence of Servants . . . . in the Management or Navigation of the Vessel or otherwise."*

Sugar in bags was shipped under a charter-party exempting the shipowner from liability for loss or damage arising from the usual perils "and all other accidents even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors or other servants of the owner in the management or navigation of the vessel or otherwise."

In the process of discharge stevedore's men, employed by the ship, recklessly used hooks which tore the bags, and carelessly allowed the bags to be cut by the slings and to burst through striking against the hatch-coamings whilst being lifted out of the hold. In an action by the charterers for damage to, and short delivery of, the sugar:—

*Held*, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), affirming the decision of Phillimore J., [1903] P. 35, that the shipowner was not liable, as the loss was covered by the exception "accidents . . . . caused by negligence . . . . of the servants of the owner" "otherwise" than "in the management or navigation of the vessel." THE "TORBRYAN" C. A. 194

**SHIPPING**—*continued.*

2. —— *Collision — Action in Personam — Practice—Writ — Foreign Co-defendant—Service out of Jurisdiction—"Necessary or proper Party"—Rules of Supreme Court*, 1883, *Order* XI., *r.* 1 (*g*).

A collision occurred in the English Channel, outside British territorial waters, between a British steamship and a French sailing vessel, which at the time was in tow of a British steam-tug. The French vessel was towed into a French port. The owners of the British steamship commenced proceedings in personam in England against the owners of the French vessel and the owners of the tug:—

*Held*, by the Court of Appeal (Collins M.R. and Mathew L.J.), affirming the decision of Gorell Barnes J., that after due service of the writ upon the owners of the tug, leave could be given, under Order XI., r. 1 (*g*), of the Rules of the Supreme Court, 1883, to issue a concurrent writ and serve notice thereof, out of the jurisdiction, upon the owners of the French vessel as being, within the meaning of the rule, proper parties "to an action properly brought against some other person (the owners of the tug) duly served within the jurisdiction." THE "DUC D'AUMALE" - - - - C. A. 18

3. —— *Collision—Assessment of Damage—Value of Ship lost.*

In estimating the value of a vessel at the time of a collision, whereby she was lost, the test, in the absence of a market value, is what the vesssl was fairly worth to her owners from a business point of view.

As to the evidence to be regarded as of weight in estimating this value, the case of *The Ironmaster*, (1859) Sw. 441, followed. THE "HARMONIDES" - - - Gorell Barnes J. 1

4. —— *Collision—Compulsory Pilotage—Exemption—London District—"Constant Trader"—Ship carrying Passengers — Pilotage Act*, 1825 (6 *Geo.* 4, *c.* 125), *s.* 59 — *Order in Council, February* 18, 1854—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 603.

A British steamship company ran two lines, one from London to Antwerp and then on to America and back, the other from London to New Orleans direct, with liberty to call at Bermuda, and their vessels were employed on either line according to convenience. A new vessel belonging to the company had made one voyage from London viâ Antwerp to Mexican ports, and was proceeding from London in charge of a duly licensed Trinity House pilot, with cargo and one passenger, on a second voyage for the same round, when she came into collision with the plaintiffs' vessel in the estuary of the Thames. In an action of damage by collision brought by the plaintiffs against the defendant company, the pilot of the defendant company's vessel was found alone to blame; but the defendants failed to sustain their plea of compulsory pilotage:—

*Held*, by the Court of Appeal (Collins M.R.,

**SHIPPING**—*continued.*

Mathew and Cozens-Hardy L.JJ.), affirming the decision of Gorell Barnes J., [1902] P. 216, that the defendants were liable, as their vessel was exempt from compulsory pilotage, being a "constant trader" between London and ports on the Continent north of Brest, within the meaning of the exemption in s. 59 of 6 Geo. 4, c. 125, supplemented by the Order in Council, February 18, 1854, and kept alive by s. 353 of the Merchant Shipping Act, 1854, for which s. 603 of the Merchant Shipping Act, 1894, is now substituted.

*The Earl of Auckland*, (1862) 15 Moo. P. C. 304, held binding and followed. THE "CAYO BONITO" - - - - C. A. 203

5. —— *Collision—Fog—Fog Signal forward of Beam—Duty to stop Engines—Regulations for Preventing Collisions at Sea*, 1897, *art.* 16—*Statutory Presumption of Fault—Foreign Vessel outside Limits of Territorial Jurisdiction—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4; *s.* 424.

A British and a Dutch steam vessel came into collision, during a dense fog, in the English Channel six miles off Dungeness. The owners of the British vessel admitted liability for an infringement of the collision regulations; but the owners of the Dutch vessel denied liability on the ground, inter alia, that though the whistle of the other vessel was heard forward of the beam, their vessel was going so slow, and the fog signal so far off, that their master thought it better to wait, before stopping his engines, until he heard the whistle again:—

*Held*, by Bucknill J., that the Dutch vessel was to blame for not stopping, which omission in fact contributed to the collision, and no circumstance had been shewn for disobeying the positive direction contained in the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, 1897, that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines . . . ."

The advantage—apart from the express provisions of the regulations—of stopping, owing to the difficulty of ascertaining at once with any degree of certainty the position of a fog signal, discussed.

*Query*, whether the statutory presumption of fault created by s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, in respect of the infringement of any of the collision regulations, will attach to a foreign vessel, beyond the limits of British territorial jurisdiction, in the absence of an Order in Council issued under s. 424, with the consent of the Government of the country to which the ship belongs, directing that, in addition to being bound by the collision regulations, the provisions of Part V. of the Act shall apply to vessels of that country as if they were British ships. THE "KONING WILLEM I." Bucknill J. 114

6. —— *Limitation of Liability—Life Claims—Property Claims—Time for Entry—Practice—Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 3—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 504—*Payment out of Unappropriated Balance.*

**SHIPPING**—*continued.*

In an action for limitation of liability the usual advertisements were issued, intimating to all persons having any claim in respect of loss of life or damage to property that, if they did not come in and enter their claims within three months from the date of the decree, they would be excluded from sharing in the amount of 15*l.* per ton standing in court to the credit of the action.

The claims entered in respect of loss of property more than exhausted the statutory liability of 8*l.* per ton; but only six out of a possible eleven claims in respect of less of life were entered within the limit of time, and these absorbed only a small portion of the statutory liability of 7*l.* per ton:—

*Held*, by Sir F. H. Jeune P., that, the Court having exercised the power given by s. 504 of the Merchant Shipping Act, 1894, of fixing the time within which claimants should come in, the unappropriated balance of the fund must be paid back to the plaintiffs in the limitation suit, notwithstanding that all the possible life claims had not been entered, and that the year had not elapsed within which, under s. 3 of Lord Campbell's Act, an action in respect of such a claim could be commenced. THE "ALMA" Jeune Pres. 55

—— Order in Council, February 18, 1854 203
*See* SHIPPING. 4.

7. —— *Pilotage—Compulsory Pilotage—Liability of Owner—Belgian Law—Collision in the River Scheldt.*

A collision occurred in the Austruweel Roads, below Antwerp, in the river Scheldt, between a British steamship, owned by the plaintiffs, coming down the river with a Belgian government pilot on board, and the defendants' British steamship at anchor. The Court found the plaintiffs' vessel alone to blame, the fault being that of the pilot, and evidence having been given as to the Belgian law on the question of compulsory pilotage:—

*Held*, by Bucknill J., that, though the employment of the pilot was compulsory in the sense that his fees must be paid, the pilot was by Belgian law the adviser of the master who remained in charge, and, therefore, the plaintiffs were liable for the damage sustained by the defendants' vessel. THE "DALLINGTON" Bucknill J. 77

8. —— *Practice—Staying Proceedings—Mortgage—Action in this Country for Declaration of Rights to assist Action in Foreign Country—Rules of Supreme Court*, 1883, *Order* XXV., *r.* 5.

The plaintiffs, mortgagees of a British ship, on default in payment of the mortgage money, took possession of the vessel and chartered her for a voyage to a French port. On arrival there the vessel and her freight were arrested by the defendants, British subjects, claiming as creditors of the mortgagors for necessaries supplied to the ship, and in respect of which they had rendered "executory" in France a judgment obtained by default in England. The mortgagees intervened in the proceedings in France, and, for the purpose of assisting them in those proceedings, they commenced separate actions against the defendants, the necessaries men, and the defendants, the mortgagors, asking, under Order XXV., r. 5, of

the Rules of the Supreme Court, 1883, for declaratory judgments that they as mortgagees in possession were entitled to the ship and her freight in priority to the necessaries men and to the mortgagors. Both defendants moved to stay the actions as vexatious :—

*Held*, by Bucknill J., that the action against the defendants, the necessaries men, would be allowed to proceed, for the opinions of foreign experts were conflicting as to the force to be attributed to an English judgment in a French Court, and no other sufficient evidence had been given to shew that, in the proceedings in France, the declaratory judgment asked for would not be of use to the plaintiffs to protect their interests as mortgagees of the vessel and owners of the freight; but that the action against the other defendants, the mortgagors, would, on the authority of *Brooking* v. *Maudslay, Son & Field*, (1888) 38 Ch. D. 636, be stayed, as the mortgagors, not having taken any active step to dispute the validity of the mortgage, could not be forced to try that issue in the present proceedings. THE "MANAR" - - - - **Bucknill J. 95**

9. —— *Salvage—Agreement under Compulsion to pay an exorbitant Sum.*

Two large laden sailing vessels were sheltering in Holyhead Harbour from a south-westerly gale, when the master of one of them, finding that his vessel had dragged down into dangerous proximity to the other, signalled for a tug. In response to the signal a tug came up; but her master demanded "1000*l.* or no rope." The master of the vessel, which had dragged her anchors, after some demur agreed to pay the sum named, and was towed back to his original berth. In an action brought by the owners, master, and crew of the tug against both vessels, their cargoes and freights upon the agreement in the one case, and for a salvage award in the other :—

*Held*, by Bucknill J., that the agreement entered into by the master of the tug with the master of the vessel which had dragged, having been forced upon the latter by compulsion, must be set aside as extortionate, and an award of 200*l.* made with costs on the county court scale; and that the action against the other vessel must be dismissed with costs, on the ground that no salvage service had been rendered by the tug to that vessel. THE "PORT CALEDONIA" AND "THE ANNA" - - - - **Bucknill J. 184**

10. —— *Salvage—Constructive Acceptance of Service.*

The defendants' barque with three tugs in attendance was lying moored outside the entrance to the Alexandra Dock at Hull waiting to enter, when a steamer coming out of the dock, owing to a rope fouling her propeller, was driven by wind and tide down on to the barque, which in turn was forced on to the Hebbles Sand. The two tugs in attendance on the steamer towed that vessel clear of the barque, and thereby the three tugs in attendance on the barque were enabled to pull that vessel off the sand. In a salvage suit commenced by the five tugs against the owners of the barque :—

*Held*, by Bucknill J., that the three tugs



which were in attendance on the barque were entitled to salvage, as their services, for the time being, were outside their towage contract, but that the claim against the barque, made by the two tugs in attendance on the steamer, must be disallowed, as there was no evidence from which a constructive acceptance of their services by the master of the barque could be inferred within the principle laid down in *The Vandyck*, (1881) 7 P. D. 42; affirmed (1882) 5 Asp. M. L. C. 17. THE "EMILIE GALLINE" - **Bucknill J. 106**

11. —— *Salvage—Information by one Person leading to a Salvage Service by another Person—Lifeboat Crew.*

The coxswain of a lifeboat, whilst endeavouring with his crew to put off to a vessel in distress, sent a telegram for the assistance of tugs. The owners of the tugs had, however, previously heard of the position of the vessel, and were already despatching their tugs. In an action of salvage :—

*Held*, by Bucknill J., that, though a person may hold the position of a salvor who does nothing more than give information, outside his duty, of such a nature as to be the cause of acts subsequently done by others which are salvage services, the claim in the present case failed, as the telegram sent by the coxswain of the lifeboat was not in fact the cause of the tugs going out to the rescue of the vessel.

The onus is upon the crew of a lifeboat, going out to save life, to shew that they have rendered services entitling them to be regarded as property salvors. THE "MARGUERITE MOLINOS" **Bucknill J. 160**

12. —— *Salvage—Standing by — Attempting to tow—Services rendered at request—Principles upon which Awards made.*

A steamship, valued at 27,000*l.*, from Philadelphia to Bremen, with a part cargo of petroleum, belonging to the owners of the steamship, of the value of 7578*l.*, the rest naphtha valued at 7000*l.*, and freight at risk 1743*l.*, became disabled so that she would not steer when about 1000 miles from Falmouth. After making some progress to the eastward, she was fallen in with by steamship No. 1, the master of which agreed to attempt to get her to Fayal; but, owing to very bad weather, after standing by and steering her for a few miles, he left the disabled vessel. She was then picked up by steamship No. 2, and towed 265 miles, when, owing to damage to the machinery of the salving vessel and the hawser parting, the disabled steamer was lost sight of. Steamship No. 3 then came up; but after a difficult towage of about twelve miles left her owing to being short of feed for the horses she was carrying. Steamship No. 4 then established communication with her, and towed her 468 miles to Falmouth, being accompanied by steamship No. 5, which belonged to the same owners as the disabled vessel, and acted as a stand-by in case of emergency. In consolidated actions of salvage by the owners, masters, and crews of the five steamships :—

*Held*, by Bucknill J., that steamship No. 1 was entitled to 800*l.* by way of payment for work done in standing by and, at request, attempting

**SHIPPING**—*continued.*

to tow, within the principle laid down in *The Benlarig*, (1888) 14 P. D. 3; that steamship No. 2 was entitled to a salvage award of 2500*l.* for having, within the principle laid down in *The Atlas*, (1862) Lush. 518, and *The Camellia*, (1883) 9 P. D. 27, meritoriously contributed to the ultimate safety of the disabled vessel, the award being fixed at a lower standard than that to which the principal salvor was entitled, as the part taken by this salvor by itself would not have produced the successful result; that steamship No. 3 was, on similar grounds, and as having brought the disabled steamer within sight of the principal salvor, entitled to an award of 800*l.*; that steamship No. 4, having towed the disabled steamer into a port of safety, was entitled, as the principal salvor, to an award of 4000*l.*; whilst the owners of steamship No. 5 were entitled, as against the naphtha cargo, to an award of 300*l.*, and her master and crew, as against ship, cargo, and freight, to an award of 150*l.*, making a total of 8550*l.* THE "AUGUST KORFF" **Bucknill J. 166**

13. —— *Wages—Disbursements—Foreign Ship—Mortgage—Lex loci — Lex fori — "Privileged Debt"—Maritime Lien—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 167.

In proceedings in rem by the foreign master of an Argentine vessel in an English port, the claim of the master consisted of—(1.) wages as supercargo, and afterwards as master; (2.) disbursements whilst acting as supercargo, and afterwards as master. On the question of priority as against a mortgagee intervening :—

*Held*, by Phillimore J., that, though by the lex loci the master could only claim his wages and disbursements for the last voyage as a "privileged debt" in priority to the mortgagee, the question was one of remedy, and therefore the lex fori applied, under which, by reason of the maritime lien conferred by s. 167 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), he could claim, in priority, the whole of his wages and disbursements whilst master. He was also entitled to add thereto his wages as a seaman whilst acting as supercargo, and such disbursements as he had then made by way of advances to the crew on account of their wages.

*The Milford*, (1858) Sw. 362, discussed. THE "TAGUS" - - - **Phillimore J. 44**

14. —— *Wages—Foreign Ship—Victualling Allowance—Repairs—Maritime Lien—Possessory Lien—Priority—Necessaries.*

Seamen on board an Italian vessel were engaged to serve at 40 lire per man per month, with a further sum of 40 lire per month in lieu of victualling. They remained by the vessel after she was taken into a shipwright's dry dock for extensive repairs, and, whilst there, the master, on behalf of himself and the crew, arrested the vessel in an action for wages and disbursements. The vessel was sold by order of the Court, and the crew sent back to their country; but the proceeds proved insufficient to meet the claim of the master and crew for wages, &c., and the claim of the shipwright for repairs. On the question of priority :—

*Held*, by Phillimore J., that the victualling

**SHIPPING**—*continued.*

allowance was equivalent to wages, carrying a maritime lien, and, therefore, the total claim of the master and crew for wages and disbursements up to the date of the vessel entering the dry dock, together with the cost of subsistence from the time of leaving the vessel until leaving the country, and the cost of repatriation ranked first, with costs, including in such costs such sum as the registrar should allow by way of subsistence money from the date of the writ to the time of leaving the vessel; then—following *The Gustaf*, (1862) Lush. 506, and *The Immacolata Concezione*, (1883) 9 P. D. 37—the common law possessory lien of the shipwright, based on his control over the vessel, displaced the maritime lien of the master and crew from the time of entry into the dry dock, and gave the shipwright priority in respect of his claim and costs, although the master and crew remained on board, and though the repairs ordered had not been completed. THE "TERGESTE" - - - **Phillimore J. 26**

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A nomination paper, executed by the nominator under s. 25 of the Industrial Societies Act, 1893, in the presence of two witnesses, who signed it in his presence, invalid as a nomination by reason of the amount it purported to dispose of being in fact over 100*l.*:—

*Held*, to be testamentary and admitted as a will. IN THE GOODS OF BAXTER
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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

BIBL. LONDIN P.U.V.